Supreme Court, U.S.
FILED
01 325 AUG 22 2001
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

American Electric Power Fuel Supply, Inc. and
Indiana Michigan Power Co., Inc.,
River Transportation Division,
Petitioners,

v.

James W. Perkins and
Judith Lynn Perkins,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TODD M. POWERS
Counsel of Record
SCHROEDER, MAUNDRELL, BARBIERE
& POWERS
11935 MASON ROAD
SUITE 110
CINCINNATI, OH 45249
(513) 583-4200

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

Does a court of appeals err when it overturns factual determinations made by the district court even though the district court's determinations were based upon its choice between two permissible views of the evidence?

Does a court of appeals err when it imposes the burden upon a Jones Act employer to be the absolute insurer of the safety of its employees and to provide an accident proof ship?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Indiana Michigan Power Company d/b/a American Electric Power is a wholly owned subsidiary of American Electric Power Company, Inc., a publicly traded corporation. "River Transportation Division" is a division of Indiana Michigan Power Company d/b/a American Electric Power. American Electric Power Service Corporation is a separate wholly owned subsidiary of American Electric Power Company, Inc. The "Fuel Supply Department" is a department of American Electric Power Service Corporation. No publicly held company owns 10 percent or more of American Electric Power Company, Inc.'s stock.

Respondents

James W. Perkins and Judith Lynn Perkins are individuals residing in Pomeroy, Ohio.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 1

A. Federal Rule of Civil Procedure 52(a) and the Standard of Review of District Court Findings of Fact 3

B. Negligence under the Jones Act and Unseaworthiness under the General Maritime Law 5

C. The Proceedings Below 10

REASONS FOR GRANTING THE WRIT 21

I. The Questions Presented are Important . . 21

II. The Decision of the Court of Appeals is Erroneous 23

CONCLUSION 24

APPENDIX

Appendix A
Court of Appeals Opinion, 4/6/01 . . . . . 1a

Appendix B
Court of Appeals Order on Petition
for Rehearing *en banc*, 5/24/01 . . . . . 28a

Appendix C
District Court Judgment, 11/24/01 . . . . . 30a

Appendix D
District Court Findings of Fact and
Conclusions of Law, 11/24/01 . . . . . 32a

Appendix E
Full Text of The Jones Act
46 U.S.C. App. §688 . . . . . 43a

Appendix F
Excerpts from Trial Transcript 46a

TABLE OF AUTHORITIES

Cases **Page**

Alrayashi v. Rouge Steel Co.,
702 F. Supp. 1334 (E.D. Mich. 1989) 6,8,17,22

Anderson v. Bessemer City,
470 U.S.564, 105 S. Ct. 1504,
84 L. Ed.2d (1985) 3-5,12,22,23

Brown v. Dravo Corp.,
258 F.2d 704 (3d Cir. 1958) 9

Bryant v. Partenreederei-Ernest Russ,
330 F.2d 185 (4th Cir.1964) 9

Burgess v. Farrell Lines, Inc.,
335 F.2d 885 (4th Cir. 1964) 9

Cherokee Ins. Co. v. E.W. Blanch Co.,
66 F.3d 117 (6th Cir. 1995) 9

Cia Maritima Del Ner Vion v.
James J. Flanagan Shipping Corp.,
308 F.2d 120 (5th Cir. 1962) 9

Clements v. Chotin Transp. Inc.,
496 F. Supp. 163 (M.D. La. 1980) 7

Colburn v. Bunge Towing, Inc.,
883 F.2d 372 (5th Cir. 1989) 7

Colon v. Trinidad Corps.,
188 F. Supp. 97 (S.D.N.Y. 1960) 9

Daughenbrauh v. Bethlehem Steel Corp.,
891 F.2d 1199 (6th Cir. 1989) 6

Davis v. Hill Eng'g, Inc.,
549 F.2d 314 (5th Cir. 1977) 6

Dempsey v. Mac Towing, Inc.,
876 F.2d 1538 (11th Cir.1989) 7

Eyler v. Commissioner of Internal Revenue,
88 F.3d 445 (7th Cir. 1996) 12

Ferguson v. Moore-McCormack,
352 U.S. 521, 77 S. Ct. 457, 1 L. Ed.2d (1957) 6

Gautreaux v. Scurlock Marine, Inc.,
107 F.3d 331 (5th Cir. 1997) 8,12,23

Havens v. F/T Polar Mist,
996 F.2d 215 (9th Cir.1993) 7

In re Cleveland Tankers, Inc.,
67 F.3d 1200 (6th Cir. 1995) 12,22

Ivy v. Security Barge Lines, Inc.,
585 F.2d 732 (5th Cir. 1978) 6

Jacob v. New York,
315 U.S.752, 62 S. Ct. 854,
86 L. Ed. 1166 (1942) 5-6,12,23

Mahnich v. Southern S.S. Co.,
321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944) . . 8,20

Mitchell v. Trawler Racer, Inc.,
362 U.S.539, 80 S. Ct. 926,
4 L. Ed.2d 941 (1960) 8-9,12,20,22,23

Ober v. Penrod Drilling Co.
694 F.2d 68 (5th Cir. 1982) 7,12,17,22-23

Oliveras v. American Export Isbrandtsen Lines, Inc.,
431 F.2d 814 (2d Cir. 1970) 12,20,22-23

Perry v. Morgan Guar. Trust Co.,
528 F.2d 1378 (5th Cir.1976) 7

Putman v. M/V Mathilde Bolten,
298 F. Supp. 660 (D. Md.1969) 9

Reinhart v. United States,
457 F.2d 151 (9th Cir. 1972) 12,20,22-23

Rogers v. Missouri Pacific R. Co.,
352 U.S. 500, 77 S. Ct. 443,
1 L. Ed. 2d. 493 (1957) 6

Southard v. Independent Towing Co.,
453 F.2d 1115 (3d Cir. 1971) 6

S.T.S. Int'l, Ltd. v. Laurel Sea Transp. Ltd.,
932 F.2d 437 (5th Cir. 1991) 12

United States v. Gypsum Co.,
333 U.S. 364, 68 S. Ct. 525,
92 L. Ed. 746 (1948) 3,23

Wainwright v. Sykes,
433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed.2d 594 (1977) . . 5

Yehia v. Rouge Steel Corp,
898 F.2d 1178 (6th Cir. 1990) 6

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100, 89 S. Ct. 1562,
23 L. Ed.2d 129 (1969) 3

Statutes

45 U.S.C. §51 5

46 U.S.C. App. §688 1,5

Other Authorities

Brian J. Miles, *The Standard of Care in a Seaman's Personal Injury Action - Has the Jones Act Been Slighted?* 13 Tul.Mar.L.J. 79 (1988) 6

THOMAS J. SCHOENBAUM,
ADMIRALTY AND MARITIME LAW, (2d Ed. 1994) 7

Indiana Michigan Power Company d/b/a American Electric Power ("AEP") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 246 F.3d 593 (6th Cir. 2001), and is reproduced in App. A at 1a-27a. The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Ohio is unreported and is reproduced in App. D at 32a-42a. The decision of the court of appeals denying the petition for rehearing *en banc* is unreported and is reproduced in App. B at 28a-29a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on April 6, 2001. A timely petition for rehearing *en banc* was denied by that court on May 24, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Jones Act, 46 U.S.C. App. §688.

STATEMENT OF THE CASE

This case arises from an accident involving Respondent James W. Perkins which occurred on December 28, 1997. Perkins was a Second Mate aboard Petitioners' commercial towboat, the *M/V C.J. Bryan*, when he allegedly

fell from an empty barge onto the deck of the *M/V C.J. Bryan*, sustaining injuries. Respondent brought suit in the district court pursuant to the Jones Act, 46 U.S.C. §688 and the general maritime law. Jurisdiction in the district court was based upon 28 U.S.C.§1331 and 28 U.S.C.§1333.

A three day bench trial was held in the United States District Court for the Southern District of Ohio on September 20-23, 1999. On the central questions — whether Petitioners were negligent under the Jones Act and whether their vessel was unseaworthy — the district court found in favor of Petitioners.

Respondents appealed, claiming, among other things, that the district court erred (1) in finding Petitioners were not negligent in failing to take certain precautions Respondents claim would have prevented Perkins' injury and (2) in finding that the ratchet Respondent was using at the time of the accident was not defective. In a complete departure from its mandated role in the federal judicial system, the court of appeals reversed the district court's findings of fact regarding negligence and unseaworthiness, substituting its own judgment for that of the district court. The court of appeals found that the lack of a safety chain or grab irons between the towknees of the *M/V C.J. Bryan* rendered the vessel an unsafe place to work and that the ratchet Respondent was using at the time of his injury was defective. The net effect of the court of appeals decision was to usurp the fact-finding role of the district court and establish new and unprecedented standards of negligence under the Jones Act and unseaworthiness under the general maritime law.

A. Federal Rule of Civil Procedure 52(a) and the Standard of Review of District Court Findings of Fact.

Federal Rule of Civil Procedure 52(a) provides that a district court's findings of fact in a bench trial shall not be set aside by a court of appeals unless they are clearly erroneous and reviewing courts must give due regard to the opportunity of the trial court to judge the credibility of witnesses. A finding of fact is clearly erroneous if, and only if, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *United States v. Gypsum Co.*, 333 U.S. 364, 394-95 (1948). A reviewing court may not overturn the finding of the district court merely because it is definitely and firmly convinced it would have decided the case differently. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The court of appeals oversteps the bounds of its duty under Rule 52(a) if it attempts to supplant the role of the trier of fact. *Id.* If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* at 573-74. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Where there are two permissible views of the evidence, the fact finder's choice between them is not clearly erroneous and should be upheld. *Anderson*, 470 U.S. at 574. This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inferences from other facts. *Id.* at 574. When a finding is based on a credibility determination,

as the *Anderson* Court made clear, it is due a special deference:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said . . . . [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Id. at 575.

In *Anderson*, this Court commented upon the rationale for Rule 52(a)'s deference to the district court:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been

> forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S. Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). For these reasons, review of factual findings under the clearly-erroneous standard--with its deference to the trier of fact--is the rule, not the exception.

Id. at 574-75.

The decision of the court of appeals in this case completely ignores the mandate of Civil Rule 52(a) and the pronouncements of this Court in *Anderson*.

B. Negligence under the Jones Act and Unseaworthiness under the General Maritime Law

The Jones Act, 46 U.S.C. App. §688 was passed in 1920 to grant a seaman a cause of action against his employer for negligence. The Act grants seamen who suffer personal injury in the course of their employment the right to seek damages against their employer in the same manner as the Federal Employer's Liability Act (FELA), 45 U.S.C.§51, allows claims by railroad employees.

Proof of negligence is essential to recovery under the Jones Act. *Jacob v. New York*, 315 U.S.752, 755 (1942).

The employer's fundamental duty under the Jones Act is to provide its seamen with a "reasonably safe place to work." *See, e.g., Yehia v. Rouge Steel Corp.*, 898 F.2d 1178, 1184 (6th Cir. 1990); *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978), *modified on other grounds* 606 F.2d 524(1979); *Davis v. Hill Eng'g, Inc.*, 549 F.2d 314, 329 (5th Cir. 1977); *Southard v. Independent Towing Co.*, 453 F.2d 1115, 1118 (3d Cir. 1971). Defendant is not required, however, to ensure the absolute safety of its employees under the Jones Act and need not provide "accident-proof" vessels or equipment. Rather, the duty is that of ordinary care in providing a reasonably safe place to work under the circumstances. *See Alrayashi v. Rouge Steel Co.*, 702 F. Supp. 1334, 1336 (E.D. Mich. 1989). While the employer's negligence in a Jones Act case need only be shown to play a slight part in producing the injury (slight causation), the plaintiff must nevertheless demonstrate that the employer was negligent (in the ordinary sense) in some respect. *See Jacob*, 315 U.S. at 755; *Ferguson v. Moore-McCormack*, 352 U.S. 521, 523 (1957); *Daughenbrauh v. Bethlehem Steel Corp.*, 891 F.2d 1199, 1204 (6th Cir. 1989).

The court of appeals below has misapprehended this relatively straightforward standard of care by reference to imprecise and inapplicable judicial opinions in which the Jones Act employer's standard of care is characterized as "slight negligence." A close reading of this Court's jurisprudence discloses the terms "slight" or "slightest" were used not to describe the standard of care, but rather to describe the reduced standard of *causation* in FELA and Jones Act cases (slight causation). *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-07 (1957); *see*, Brian J. Miles, *The Standard of Care in a Seaman's Personal Injury Action - Has the Jones Act Been Slighted?* 13 Tul.Mar.L.J. 79 (1988).

The employer must have notice and the opportunity to correct an unsafe condition before liability will attach. *Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993) (*citing, Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 374 (5th Cir.1989)). There must be some evidence from which the trier of fact can infer that the owner either knew, or in the exercise of due care, should have known of the unsafe condition. *Dempsey v. Mac Towing, Inc.*, 876 F.2d 1538, 1543 (11th Cir.1989); *see also Perry v. Morgan Guar. Trust Co.*, 528 F.2d 1378, 1379 (5th Cir.1976).

As a reading of the statute confirms, the standard of care in a Jones Act case is simply "negligence," which is properly defined as follows:

> Negligence is the failure to exercise the care which an ordinary prudent person would use under the circumstances in discharging the duty that he owes to those who work on a vessel. The shipowner has a continuing duty to provide a reasonably safe condition.

THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, §6-22 at 319 (2d Ed. 1994) (*citing, Clements v. Chotin Transp. Inc.*, 496 F. Supp. 163,165 (M.D. La. 1980). This standard of care reflects the basic duty of the shipowner/employer to provide the seaman with a reasonably safe place to work. *Id.* This duty is not absolute, however; it is a duty to take reasonable care under the circumstances. *Id.* (*citing, Ober v. Penrod Drilling Co.* 694 F.2d 68 (5th Cir. 1982), modified on other grounds 726 F.2d 1035 (1984)).

Seamen are under a duty to use reasonable care for their own safety. Seamen are obligated under the Jones Act to act with ordinary care under the circumstances prevailing

at the time. The prevailing circumstances include not only the condition of the work environment at the time of the injury, but also the seaman's experience and training. Seamen are required to make use of their faculties, to observe and avoid danger and are presumed to know and see what a prudent seaman with their experience and training would know and see. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997).

Pursuant to the general maritime law, employers are required to provide seamen with a seaworthy vessel upon which to work. The employer's duty to provide a seaworthy ship is "absolute and completely independent of its duty under the Jones Act to exercise reasonable care." *Mitchell v. Trawler Racer, Inc.*, 362 U.S.539, 549 (1960); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 102 (1944). A seaworthy vessel is one which is reasonably fit for its intended purpose, or reasonably safe for the work being performed. The employer is not required to provide its employees with the best vessel or equipment, or with a perfect vessel, but with a vessel that is reasonably fit and safe. *See Mitchell*, 362 U.S. at 549 (1960); *Alrayashi v. Rouge Steel Co.*, 702 F. Supp. 1334, 1337 (E.D. Mich. 1989). Therefore, in order to recover for an unseaworthy condition, a seaman must prove that the vessel in question or its appurtenances or equipment were not reasonably fit or safe for their intended purposes. A seaman must further prove by a preponderance of the evidence that any such unseaworthy condition was a proximate cause of his injuries. *Mitchell*, 362 U.S. at 549; *Alrayashi*, 702 F. Supp. at 1337.

In *Mitchell v. Trawler Racer, Inc.*, this Court stated as follows:

> The owner is [not] obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suited for her intended service.

362 U.S. 539, 550 (1960). It is well-recognized that a seaman can not expect his life at sea to be completely free from risk and that there are certain unavoidable hazards which he must face which do not necessarily render the vessel unseaworthy. *Colon v. Trinidad Corp.* 188 F. Supp. 97, 100 (S.D.N.Y. 1960) ("a seaman is not absolutely entitled to a deck that is not slippery. He is absolutely entitled to a deck that is not unreasonably slippery."). Moreover, the mere happening of an accident is not in and of itself proof of negligence or unseaworthiness. *Brown v. Dravo Corp.*, 258 F.2d 704, 706 (3d Cir. 1958), *cert. denied* 359 U.S. 960 (1959).

Compliance with industry practice and custom, while not conclusive, is evidence that a vessel is seaworthy and that a seaman has been provided with a safe place to work. *See, e.g., Cherokee Ins. Co. v. E.W. Blanch Co.*, 66 F.3d 117, 123 (6th Cir. 1995); *Bryant v. Partenreederei-Ernest Russ v. Oriole Ship Celling Co.*, 330 F.2d 185, 190 (4th Cir.1964); *Burgess v. Farrell Lines, Inc.*, 335 F.2d 885, 890 (4th Cir. 1964); *Cia Maritima Del Ner Vion v. James J. Flanagan Shipping Corp.*, 308 F.2d 120, 123 (5th Cir. 1962); *Putman*

v. M/V Mathilde Bolten, 298 F. Supp. 660, 665 (D. Md.1969).

The decision of the court of appeals in the instant case sets new and unprecedented standards of negligence under the Jones Act and unseaworthiness under the general maritime law, making Petitioners insurers of their employees' safety and requiring them to provide an accident proof ship.

C. The Proceedings Below

Respondents, James W. Perkins and his wife, Judith Lynn Perkins, filed suit against Petitioners on January 21, 1998. The Complaint invokes the district court's admiralty jurisdiction and alleges "while going about his normal and ordinary duties, [Respondent] was caused to use a defective ratchet . . . and the dog of the ratchet failed to catch properly causing Respondent to fall . . . onto the steel decks of the motor vessel to which he was assigned."

The Complaint sought damages arising from Respondent's personal injury and alleged his injuries were caused by the negligence of Petitioners AEP under the Jones Act and/or the unseaworthiness of *M/V C.J. Bryan* or barge AEP-508 under the general maritime law.

In addition, the Complaint sought recovery of damages under the general maritime law for loss of consortium on behalf of Respondent's wife, Judith Lynn Perkins, and made reference to a claim under the Americans with Disabilities Act ("ADA") without making any specific factual allegations to support that cause of action. The district court granted Petitioners' motion for summary judgment with respect to the loss of consortium and ADA claims.

This case was tried to the district court from September 20, 1999 through September 23, 1999. On November 24, 1999, the district court issued its Findings of Fact and Conclusions of Law and entered judgment in favor of Petitioners on all claims. The district court concluded Petitioners were not negligent under the Jones Act and their vessel was seaworthy under the general maritime law.

The district court specifically found as a matter of fact that the lack of a "safety chain" or "grab irons" between the towknees of the *M/V C.J. Bryan* did not render her unsafe or unfit for service on the date of the accident. (App. D at 38a-39a). The district court further found that, because evidence established a ratchet in perfect condition can slip despite the use of proper technique, the mere fact that a ratchet slips does not indicate the ratchet was defective. (App. D at 35a).

In an Opinion dated April 6, 2001, the court of appeals reversed the district court decision in part and affirmed the decision in part, remanding the case for a determination of damages and comparative negligence.

The court of appeals found no legal error in the district court's decision but reversed the decision based upon errors attributed to the district court's finding of facts. In a complete departure from its mandated role, the court of appeals second-guessed the factual determinations made by the district court, and effectively engaged in a trial *de novo*, culminating in the substitution of its own judgment for that of the district court concerning the credibility of witnesses and the relative weight to be attributed to evidence presented at trial. Contrary to the factual findings of the district court which were based on substantial record evidence, the court of appeals found the Petitioners were negligent in not providing a rigging deck, safety chain or grab irons between the towknees. Also

contrary to the district court's findings based upon substantial evidence, the court of appeals found that the *M/V C.J. Bryan* and barge AEP-508 were unseaworthy because of an alleged defective condition of the ratchet Respondent was using at the time of his injury.

The decision of the court of appeals contradicts precedent from this Court and other courts of appeal which provide where there are two permissible views of the evidence, the fact finder's choice between them is not clearly erroneous and should be upheld. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *Eyler v. Commissioner of Internal Revenue*, 88 F.3d 445, 448 (7th Cir. 1996); *In Re Cleveland Tankers, Inc.*, 67 F.3d 1200, 1205 (6th Cir. 1995); *S.T.S. Int'l, Ltd. v. Laurel Sea Transp. Ltd.*, 932 F.2d 437, 439 (5th Cir. 1991).

The decision of the court of appeals also ignores precedent from this Court and other courts of appeal holding that an employer is not, under the Jones Act or the Warranty of Seaworthiness, an insurer of the absolute safety of its employees. *See, e.g., Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550; *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 815 (2d Cir. 1970); *Reinhart v. United States*, 457 F.2d 151, 152 (9th Cir. 1972) (a ship and its equipment are seaworthy if they are reasonably fit for their intended use and an employer is not under a duty to provide a completely accident proof ship); and *Jacob v. New York*, 315 U.S.752, 758 (1942); *Ober v. Penrod Drilling Co.*, 694 F.2d 68, 70 (5th Cir. 1982) *modified on other grounds* 726 F.2d 1035 (1984); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (*en banc*) (an employer's duty under the Jones Act is to provide a reasonably safe place to work and not to be an insurer of the safety of its employees).

The court of appeals improperly reversed the findings of fact made by the district court that the installation of a rigging deck, safety chains or grab irons between the towknees of a vessel such as the *M/V C.J. Bryan* is not customary or common in the industry and that the lack of such equipment on the *M/V C.J. Bryan* did not constitute negligence on the part of Appellees or render Appellees' vessel unseaworthy. The district court held:

> The installation of a "rigging" or "safety" deck between the towknees is not required by regulation, nor is it customary or common in the industry on a vessel like the *M/V C.J. Bryan*. Likewise, the installation of a "safety chain" or grab irons between the towknees is not required or customary in the industry. Neither the absence of these safeguards, nor the lack of rubber on the towknees, rendered the *C.J. Bryan* unsafe or unfit for service the night of December 28, 1997.

District Court's Findings of Fact and Conclusions of Law, (App. D at 38a-39a).

The court of appeals held:

> Although the district court correctly pointed out that there were no regulations or industry practices requiring the presence of safety ropes or handrails, there was no evidence that safety ropes or handrails were inconsistent with custom and practice. The evidence at trial reveals that Defendants installed safety chains and rails in several other areas of the vessel. Moreover, other vessels in Defendants' fleet

had safety appliances between the tow knees. Defendants' expert testified at trial that the size of the vessel would prohibit the installation of a safety deck, but conceded that nothing prevents the installation of a safety chain on top of the tow knees. Defendants argue that the inspections of the Responsible Carrier program did not result in recommendations that either safety chains or safety decks be constructed on the ship. However, the testimony does not point to the extent of those inspections and whether the inspections were meant to consider whether safety chains or safety decks were needed.

In addition, there was testimony by Defendants' safety manager that, one month prior to Plaintiff's accident, another worker on the *M/V C.J. Bryan* fell from the tow knee and was injured. Furthermore, Defendants' expert testified that the failure of the ratchet was common in the industry. Based on these facts, we conclude that the district court erred in determining that Defendants were not negligent in failing to provide adequate safety measures. These facts show that Defendants knew of the risk that the ratchet could fail and also knew that a seaman could fall from the tow knee and injure himself; nevertheless, Defendants failed to adequately guard against these risks for the safety of their seamen. Moreover, that Defendants had installed safety ropes in other ships and other areas of the *M/V C.J. Bryan* indicates that it would not have been excessively burdensome in light of the

> risks to the seamen for Defendants to install safety ropes here. Given that one month prior to Plaintiff's injury another seaman was injured by a fall on the *M/V C.J. Bryan*, we conclude that Defendants were negligent in failing to take adequate safety precautions in the face of the notice of the danger to their seamen.

Decision of the court of appeals, (App. A pp. 15a-16a).

As this excerpt evidences, the decision of the court of appeals simply substituted the court of appeals' judgment as to how the facts should have been determined for that of the district court. This is clearly impermissible since the record evidence contains significant and uncontradicted evidence supporting the district court's determination that Petitioners were not negligent and their vessels were seaworthy. Particularly telling is the court of appeals' inability to describe in any specific or meaningful way what these safety devices would look like, how they would be implemented, or how they would have prevented Respondent's injury. The court of appeals' failure in this regard is not surprising, since there was no evidence at trial presented by Respondent to carry his burden of proving that any of these safety devices is practical or has ever been used elsewhere in the industry on similar vessels. In fact, the only expert testimony on the issue was that such safety devices are not practical, appropriate or effective and are not used on vessels of the class of the *M/V C.J. Bryan* by any towboat company in the industry. (App. F at 110a).

The decision of the court of appeals concludes that there was no evidence concerning the extent of the Responsible Carrier Program inspections and whether those

inspections were meant to consider whether safety chains or safety decks were needed. While this may be true, it ignores the fact that the Respondent introduced no evidence to contradict the testimony of Petitioners' expert, Captain David Hammond, that the *M/V C.J. Bryan* was equipped in a manner consistent with industry practice and custom and was reasonably safe for its intended purpose. (App. F at 111a-112a). Perhaps even more significantly, Respondent's expert conceded on cross examination that the vessel was in a condition sufficient to allow Respondent to perform the task safely with the use of adequate care. (App. F at 86a-90a). Moreover, Respondent introduced no evidence as to specifically how safety chains or ropes would be installed on the *M/V C.J. Bryan* or how such devices may have prevented Respondent's injury.[1] Rather, the uncontradicted evidence from Petitioners' expert, which is completely disregarded by the decision of the court of appeals, is that the *M/V C.J. Bryan*, as equipped, was reasonably safe for its intended purpose.

The decision of the court of appeals relies heavily on its characterization of testimony by Petitioners' Human Resources Manager to the effect that one month prior to Respondent's accident another worker on the *M/V C.J. Bryan* fell from the towknee and was injured. As the record evidence discloses, that incident occurred when the employee lost his balance and fell down the steps of the towknee. (App. F at 49a-50a). None of the safety equipment suggested by the

---

1 Because this theory of liability was not disclosed prior to trial, Respondent's expert was not permitted to testify concerning whether the lack of these "safety devices" rendered the vessel unseaworthy or was inconsistent with industry practice. (App. F at 73a-76a).

Respondent would have any application to this previous accident, since the safety equipment would have been located on the opposite side of the towknee from where this previous accident occurred. It should also be noted that the employee involved in the previous incident filed suit against AEP and was denied recovery in a judgment entered by the United States District Court for the Eastern District of Kentucky, holding AEP was not negligent and its vessel was seaworthy at the time of the incident.

There is a complete absence in the record of any evidence AEP was aware of any prior incident similar to the one involving Mr. Perkins. To the contrary, the record evidence established that AEP had no such notice. Steve Edens, Human Resources Manager at AEP, testified he was aware of no similar incident. (App. F at 49a). Captain Harrington and Captain Hammond, with combined experience of over 70 years in the industry, testified they knew of no other accident similar to this occurring at AEP or any other company in the industry. (App. F at 57a-58a; App. F at 117a). Thus, not only did the court of appeals substitute its judgment as to how the facts should be resolved for that of the district court, it did so based upon a misinterpretation of the record evidence.

In reversing these findings of fact, the court of appeals effectively imposed a duty upon Petitioners, as Jones Act employers, to ensure their employees are provided an accident-free workplace in contradiction to precedent from this Court, and other circuit courts of appeal, holding a Jones Act employer is required only to provide a reasonably safe place to work and is not required to provide accident-proof vessels or equipment or an absolutely safe workplace. *Ober v. Penrod Drilling Co.*, 694 F.2d 68, 70 (5th Cir. 1982) *modified on other grounds* 726 F.2d 1035 (1984); *Alrayashi*

v. Rouge Steel Co., 702 F. Supp. 1334, 1337 (E.D. Mich. 1989).

The court of appeals also erred when it improperly reversed findings of fact made by the district court that the *M/V C.J. Bryan* and barge AEP-508 were not unseaworthy because of an alleged defective condition or malfunction of the ratchet Respondent was using at the time of the incident. The district court held:

> Although ratchets with worn gears or those with debris like coal or ice in the gears are more likely to slip, a ratchet in perfect condition can slip despite the use of the proper technique . . . . Accordingly, simply because the dog on a ratchet slips does not indicate the ratchet was defective . . . .

District Court's Findings of Fact and Conclusions of Law, (App. D at 35a).

The court of appeals disagreed with this finding of fact, holding:

> The district court therefore erred in determining that, despite the testimony that the ratchet malfunctioned under normal use, the *M/V C.J. Bryan* and AEP-508 were seaworthy. To the contrary, the record indicates that Defendants failed in their absolute duty to maintain a seaworthy vessel because the ratchet Plaintiff was using the night of his injury was not reasonably fit for its intended use.

Decision of the Court of Appeals, (App. A at 18a).

Again, the court of appeals substituted its judgment as to how disputed facts should have been resolved for that of the district court. This is inconsistent with the binding precedent of this Court since there was an abundance of evidence in the record to support the district court's determination of this issue of fact.

The district court concluded that Respondent fell after the dog slipped on the night of his injury, not because of a defective condition of the ratchet but because of his own negligence in positioning himself in violation of AEP's safety rules and policy which he acknowledged that he knew and violated. Although not mentioned in the decision of the court of appeals, Respondent's expert testified that by using adequate care, the Respondent could have performed the task of tightening the ratchet safely using the equipment in question. (App. F at 86a-90a). Both Captain Harrington and Captain Hammond testified without contradiction that based upon their extensive experience in the industry, had Respondent been using the proper procedure of stopping at vertical while tightening the ratchet, he would not have lost his balance and fallen when the dog slipped. (App. F at 54a; App. F at 103a). Notably, Respondent's own expert also testified that the job Respondent was performing at the time of his accident could have been performed safely had appropriate care been taken by Respondent. (App. F at 86a-90a). This fact alone provides sufficient basis for the district court's determination that the vessel and her equipment were reasonably safe for their intended purpose. Respondent failed to introduce any evidence establishing a safer method of tightening the ratchet.

The uncontroverted evidence at trial established the ratchet being used by Perkins at the time of his injury was the industry standard and identical to every other ratchet used throughout the industry. The evidence further established that ratchets are subject to the dogs slipping from time to time, not due to a defect or malfunction, but because of the nature of their design and the use to which they are placed. The tendency of these ratchets to slip was well known to the Respondent and was the reason for Petitioners' safety policy prohibiting straddling of the ratchet and pushing the handle past vertical. (App. F at 64a). Moreover, the expert witnesses agreed that the ratchet in question met industry standards. (App. F at 105a, 111a-112a). The testimony of the expert witnesses for both Petitioner and Respondent provided consistent evidence the ratchet in question behaved exactly as Respondent would have expected and did not fail or malfunction. Respondent introduced no evidence of a safer, more reliable alternative to the ratchet in question.

The Petitioners' expert witnesses provided uncontradicted evidence at trial which supported the district court's factual determination that the *M/V C.J. Bryan* and its tow met industry standards and was reasonably safe under the circumstances. (App. F at 110a). In reversing this finding of fact, the court of appeals effectively imposes a duty upon all vessel owners to ensure their employees are provided with accident-proof vessels with the best equipment, rather than vessels which are reasonably fit and safe for their intended purpose, in contradiction to this Court's precedent regarding the warranty of seaworthiness. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960); *Mahnich v. Southern SS Co.* 321 U.S. 96, 103 (1944); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 815 (2d Cir. 1970); *Reinhart v. United States*, 457 F.2d 151, 152 (9th Cir. 1972).

The district court correctly interpreted and applied the applicable admiralty law as is evidenced by the district court's conclusions of law:

> In this case, the Court concludes the Plaintiff has failed to prove Defendant AEP breached its duty of care to Plaintiff or was negligent in any respect. As set forth above, in the Court's findings of fact, Plaintiff was provided with satisfactory equipment on the night of his injury, and was given adequate training and supervision given his experience, and was provided a reasonably safe place to work. Accordingly Plaintiff has failed to prove a claim against Defendant under the Jones Act.

District Court's Findings of Fact and Conclusions of Law, (App. D at 40a). The district court's decision was both well reasoned and supported by the record evidence. The decision of the court of appeals improperly substituted its own judgment concerning how disputed facts should be resolved for that of the district court. In doing so, the court usurped the district court's fact finding role and contradicted precedent of the United States Supreme Court, the Sixth Circuit, and other circuit courts of appeal.

REASONS FOR GRANTING THE WRIT

I. The Questions Presented are Important

This proceeding involves questions of exceptional importance in that the decision of the court of appeals conflicts with decisions of this Court and other United States Courts of Appeal which have addressed the issue of the proper standards of liability under the Jones Act and the

warranty of seaworthiness. This Court and other circuit courts have held that an employer and ship owner need not provide accident-proof vessels or equipment. Rather, the appropriate duty under the Jones Act is for the employer to use ordinary care in providing a reasonably safe place to work under the circumstances. *Ober v. Penrod Drilling Co.*, 694 F.2d 68, 70 (5th Cir. 1982) *modified on other grounds* 726 F.2d 1035 (1984); *Alrayashi v. Rouge Steel Co.*, 702 F. Supp. 1334, 1337 (E.D. Mich. 1989). Similarly, this Court and other courts of appeal have held that a vessel and its equipment are seaworthy if reasonably fit for their intended purpose. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550; *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 815 (2d Cir. 1970); and *Reinhart v. United States*, 457 F.2d 151, 152 (9th Cir. 1972). The employer is not required to provide its employees with the best vessel or equipment, or with a perfect vessel, but with a vessel that is reasonably fit and safe. *Id.* The decision of the court of appeals ignores binding precedent from this Court on these issues and places the Sixth Circuit in conflict with the other circuit courts of appeal which have examined these issues

The decision of the court of appeals also conflicts with decisions of this Court, other Courts of Appeal and other decisions of the Sixth Circuit with respect to a circuit court's review of the factual findings of a district court. It is well settled that in examining findings of fact, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 573; *In Re Cleveland Tankers, Inc.*, 67 F.3d 1200, 1205 (6th Cir. 1995). The decision of the court of appeals completely ignores this binding Supreme Court precedent and the limitations placed upon it by Federal Rule of Civil Procedure 52(a).

As a result, this is a case of extraordinary importance which this Court should review.

II. The Decision of the Court of Appeals Is Erroneous

A close examination of the record in this case compels the conclusion that the court of appeals erred in reversing findings of fact made by the district court where (1) there was ample evidence presented at trial to support the findings of fact which were reversed by the court of appeals and (2) the district court's findings on these issues were choices between two permissible views of the evidence. The court of appeals' contrary determination is erroneous in light of *Anderson v. Bessemer City*, 470 U.S. 564, 573 and *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) which hold that where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

The court of appeals also erred in its determination of the law to be applied. The court of appeals failed to apply *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550; *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 815 (2d Cir. 1970); and *Reinhart v. United States*, 457 F.2d 151, 152 (9th Cir. 1972) which hold that a ship and its equipment are seaworthy if they are reasonably fit for their intended use and that an employer is not under a duty to provide a completely accident proof ship. Finally, the court of appeals failed to apply *Jacob v. New York*, 315 U.S.752, 755 (1942); *Ober v. Penrod Drilling Co.*, 694 F.2d 68, 70 (5th Cir. 1982) *modified on other grounds* 726 F.2d 1035 (1984); and *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (*en banc*) which hold that an employer's duty under the Jones Act is to provide a reasonably safe place to work and not to be an insurer of the safety of its employees.

As a result, the decision of the court of appeals is erroneous and must be reversed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Todd M. Powers
Counsel of Record
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
11935 Mason Road, Suite 110
Cincinnati, Ohio 45249
(513) 583-4200

Attorney for Petitioners American Electric Power Fuel Supply, Inc. and Indiana Michigan Power Co., Inc., River Transportation Division

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed April 6, 2001]
No. 99-4500

JAMES W. PERKINS,
Plaintiff-Appellant,

JUDITH LYNN PERKINS,
Plaintiff,

v.

AMERICAN ELECTRIC POWER FUEL SUPPLY, INC.; INDIANA MICHIGAN POWER COMPANY, INC., RIVER TRANSPORTATION DIVISION,
Defendants-Appellees.

Appeal from the Unites States District Court
for the Southern District of Ohio at Cincinnati,
No. 98-00064--Sandra S. Beckwith, District Judge

OPINION

CLAY, Circuit Judge. Plaintiff, James Perkins, appeals from the district court's order entering judgment in favor of Defendants, American Electric Power Fuel Supply, Inc. ("AEP") and Indiana Michigan Power Company, Inc., River Transportation Division, [1] after a bench trial on Plaintiff's claims for negligence under the Jones Act, *46* U.S.C. § 688, and unseaworthiness under general maritime law. Plaintiff also appeals the district court's order denying Plaintiff's pre-trial motion to continue the trial date, extend discovery, and amend his complaint. For the reasons that follow, we **REVERSE** in part and **AFFIRM** in part the district court's order entering judgment against Plaintiff and **REMAND**; however, we **AFFIRM** the district court's order denying Plaintiff's pretrial motion.

BACKGROUND

Plaintiff worked for Defendant AEP from 1980 until the date of his accident. Plaintiff worked as a deckhand from 1980 to 1988 on commercial river vessels. In 1988, he was promoted to second mate, the position he held until his injury which is the subject of this litigation. Defendant AEP is a river transportation company, transporting bulk commodities, primarily coal, on the Ohio River and its tributaries. Defendants were the operators of the M/V C.J. Bryan and barge AEP-508.

Plaintiff's duties as second mate included seeing that wires, ratchets and rigging were properly placed on the tow,

---

[1] Defendant AEP owns and operates Defendant Indiana Michigan Power Company, Inc.

in accordance with the captain's orders, and inspected prior to use. Plaintiff was injured on December 28, 1997 when he fell from barge AEP-508 to the deck of the *M/V C.J. Bryan*, a distance of about eight or nine feet. When Plaintiff fell, he was attempting to "lay" a "rock and roll" or "jockey" wire from an outside barge to the *M/V C.J. Bryan*. Although Plaintiff had laid dozens of wires on inside barges before, he had never performed this specific task. Plaintiff was attempting to lay the wire by tightening it using a stationary rachet located on the port stern of barge AEP-508, cranking the ratchet outboard with a cheater pipe slipped over the ratchet handle for added leverage. Plaintiff had gotten the wire substantially tight when the "dog" [2]of the ratchet failed to catch properly, causing the tension on the cheater pipe to give way. Then, Plaintiff was propelled forward, lost his balance and fell over the edge of the barge onto the deck of the *M/V C.J. Bryan*. The evidence at trial revealed that Plaintiff was straddling the ratchet while attempting to lay the wire.

Plaintiff sustained extensive injuries from the fall including permanent disabling injuries. Plaintiff suffers from chronic pain and permanent physical limitations. He has had five surgeries; his right knee is permanently fused; his right leg stands a half inch off the ground; and his left ankle is fitted with a steel plate and may require fusion or even amputation.

---

[2] The "dog" is the brake-like component of the ratchet designed to engage the teeth of one of the gears to prevent the gear from turning. (J.A. at 1012, 1375.)

Plaintiff and his wife, Judith Perkins, filed suit against Defendants for his injuries on January 21, 1998. The complaint alleged that Defendants were liable for negligence under the Jones Act and for the unseaworthiness of the *M/V C.J. Bryan* and/or the AEP-508 barge under general admiralty law because the ratchet Plaintiff used was defective and was the cause of his injuries, and Defendants failed to take adequate safety precautions and provide training for Plaintiff[3].

Prior to trial, on July 6, 1999, Plaintiff filed a motion to continue the trial, amend his complaint, and extend discovery. The district court denied the motion on August 17, 1999 and the matter went to trial on September 20, 1999.

After a three-day bench trial, the district court found that Defendants were not negligent and that the *M/V C.J. Bryan* and AEP-508 barge were seaworthy. Moreover, although not necessary to its decision, the district court concluded, without explanation, that Plaintiff was negligent in straddling the ratchet in violation of AEP policy and that his negligence was likely the sole proximate cause of his injuries. This appeal followed.

ANALYSIS

---

[3]Plaintiff alleged an additional claim under the Americans with Disabilities Act (ADA) and his wife alleged a claim for loss of consortium. The district court granted summary judgment to Defendants on the loss of consortium claim on August 20, 1998 and dismissed the ADA claim after Plaintiff failed to answer a show cause order. These claims are not before the Court in this appeal.

I.

We review the district court's legal conclusions de novo. See *Schroyer v. Frankel,* 197 F.3d 1170, 1173 (6th Cir. 1999). The factual findings of the district court following a bench trial are reviewed for clear error. *See id.* In our review of the district court's factual findings, this Court gives due regard to the district court's opportunity to judge the credibility of the witnesses. *See Adams County Reg'l Water Dist. v. Vill. of Manchester, Ohio*, 226 F.3d 513, 517 (6th Cir. 2000). A finding of fact is clearly erroneous "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948)).

This action arises under the Jones Act, 46 U.S.C. § 688, and general admiralty law. Plaintiff, Defendants' employee and a seaman,[4] claims that Defendants were negligent and Defendants' vessels, the *M/V C.J. Bryan* and AEP-508, were unseaworthy because the equipment appurtenant thereto, namely the ratchet, malfunctioned under proper and intended use and Defendants failed to provide adequate safety measures and training for Plaintiff.

Plaintiff contends on appeal that the district court erred in its factual findings and application of the law. Specifically,

---

[4] Neither party contests that Plaintiff is a seaman within the meaning and coverage of the Jones Act.

Plaintiff claims that the district court erred in finding that the ratchet was not defective, that Plaintiff had received adequate training, that Defendants were not negligent in failing to take certain safety precautions to prevent Plaintiff's injury, and that the *M/V C.J. Bryan* and AEP-508 barge were not unseaworthy. Plaintiff also claims that the district court disregarded Plaintiff's status as a ward of the court and erred in its application of the proof of negligence required under the Jones Act and the standard of liability under the seaworthiness doctrine. And although not necessary to the district court's decision, Plaintiff also challenges the district court's finding that Plaintiff was negligent in straddling the ratchet and that Plaintiff's negligence was likely the sole cause of his injuries. We hold that the district court erred in concluding that Plaintiff was not entitled to recover either on the Jones Act claim or the unseaworthiness claim.

A.

It is a well-settled principle of law that seamen are "emphatically the wards of the admiralty." *Chrandis, Inc. v. Latsis,* 515 U.S. 347, 354-55, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995) (citation and quotation omitted); accord *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 431, 83 L. Ed. 265, 59 S. Ct. 262 (1939); *Davis v. Am. Commercial Lines, Inc.*, 823 F.2d 1006, 1007 (6th Cir. 1987).

> The paternal regard of the Courts and Congress for seamen has, for the most part, grown out of the peculiar conditions of their employment. These conditions, by their very nature rigorous and subjecting the seaman to

> unusually severe discipline for extended periods of time, are quite unlike the conditions which attend land labor, and have resulted in extraordinary remedies being made available to those who accept this calling.

Paul v. United States, 205 F.2d 38, 42 (3d Cir. 1953). "It is for this reason that remedial legislation [enacted] for the benefit and protection of seamen has been liberally construed to attain that end." *Socony-Vaccum,* 305 U.S. at 431; accord *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 782, 96 L. Ed. 1294, 72 S. Ct. 1011 (1952).

One such remedial measure is the Jones Act, 46 U.S.C. § 688, which provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

46 U.S.C. § 688. Under the Jones Act, seaman are afforded rights parallel to those given to railway employees under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 et. seq. The FELA provides in pertinent part:

> Every common carrier by railroad ... shall be liable in damages to any person suffering injury while he is employed by such carrier ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51. Therefore, in suits under the Jones Act, the court must determine whether the evidence justifies the conclusion that the employer was negligent and that the employer's negligence played any part, however slight, in producing the injury to the seaman. *See Sweeney v. Am. Steamship Co.*, 491 F.2d 1085, 1089 (6th Cir. 1974).

> Proof of negligence (duty and breach) is essential to recovery under the Jones Act. See *Jacob v. City of New York*, 315 U.S. 752, 755, 86 L. Ed. 1166, 62 S. Ct. 854 (1942). Whether an employer is negligent is determined under the "ordinary prudence" standard normally applicable in negligence cases. *See Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997). However,

> once the plaintiff proves negligence, he need only show that his employer's negligence is the cause, in whole or in part, of his injuries. *See Daughenbaugh v. Bethlehem Steel Corp.*, 891 F.2d 1199, 1204 (6th Cir. 1989). In essence, there is a reduced standard for causation between the employer's negligence and the employee's injury. *See Gautreaux*, 107 F.3d at 335. Moreover, because the comparative negligence principle applies to negligence actions under the Jones Act, any negligence on the part of the employee operates only to mitigate the damages due to the employee unless his negligence is the sole cause of his injuries. *See Jacob*, 315 U.S. at 755.

To recover, the plaintiff must first establish "the breach of a duty to protect against foreseeable risks of harm." *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 437 (4th Cir. 1999). In the instant case, Plaintiff alleged that Defendants were negligent in several respects: (1) in providing a defective ratchet with which Plaintiff had to work; (2) in failing to provide Plaintiff with adequate training; and (3) in failing to take certain safety precautions to prevent Plaintiff's injury. We conclude that Plaintiff met his burden of proof with respect to the safety precautions and that the district court clearly erred in this respect. As to the other two claims of negligence, the defective ratchet and the training, we are not similarly convinced that Plaintiff met his burden of proof. We will address each in turn.

We conclude that Plaintiff has failed to establish the breach of a duty with respect to his first theory of negligence,

that the ratchet was defective, inasmuch as Plaintiff has failed to establish the employer's prior notice of the defect or that the risk of harm from a defective ratchet was foreseeable. It is a fundamental principle that, under the Jones Act, an employer "must have notice and the opportunity to correct an unsafe condition before liability will attach." *Havens v. F/T Polar Mist,* 996 F.2d 215, 218 (9th Cir. 1993). "There must be some evidence from which the trier of fact can infer that the owner either knew, or in the exercise of due care, should have known of the unsafe condition." *Id.* The evidence on record fails to show that Defendants knew or should have known of any possible defect in the particular ratchet Plaintiff was using or that they had an opportunity to correct such a defect. In fact, the evidence demonstrates that Plaintiff himself inspected the ratchet prior to using it and did not detect any defects. Moreover, Plaintiff's supervisor conducted another visual inspection of the ratchet after Plaintiff's accident and did not detect any defects in the ratchet; this constitutes evidence that Defendants did not have notice of any defect in the ratchet. Absent evidence sufficient to show that Defendants knew or should have known that the ratchet was defective, Plaintiff has failed to establish that Defendants breached a duty to protect Plaintiff from a foreseeable risk. *See Ribitzki v. Canmar Reading & Bates, Ltd.,* 111 F.3d 658, 663 (9th Cir. 1997).

Similarly, we conclude that Plaintiff has failed to establish that Defendants were negligent in ensuring that Plaintiff was adequately trained to lay the jockey wire. With respect to the adequacy of Plaintiff's training, the district court found:

17. Plaintiff was an experienced seaman. He received on-the-job training which is consistent with the custom and practice in the river industry. In addition, during his seventeen year with AEP, Plaintiff attended safety meetings on at least a monthly basis. When Captain Harrington was aboard the vessel, Plaintiff attended safety meetings on a weekly basis. Some of these meetings included instruction and warnings regarding the safe use of ratchets, cheater pipes and other rigging.

18. Moreover, Plaintiff had significant experience in laying and tightening jockey wires. Having laid 50-100 such wires before the night of his injury, he was familiar with the risks and dangers associated with that type of wire. Although Plaintiff testified that this was the first time he had laid the wires to the outside barges, as opposed to a center barge, the Court finds this configuration did not change the way in which the wires were tightened or the way the ratchet was positioned and cranked. Moreover, Plaintiff had laid thousands of other wires, at least some of which had required him to tighten the ratchet toward an empty cargo hopper or toward the edge of a barge exposing him to comparable danger, which would have given him similar training and experience. The Court finds Plaintiff had adequate training and experience to safely lay the jockey wire on the night of his injury.

(J.A. at 37-38.) We are not convinced that these findings are clearly erroneous.

Plaintiff does not deny that he had previously laid thousands of wires safely. His testimony reveals that he had no reason to believe that he could not perform the procedure safely that night. Plaintiff, however, argues that he had never laid a jockey wire to an outside barge before. Plaintiff argues that he had experience in laying the wire to the center barge, not the outside barge. There is a difference between the two, Plaintiff argues, such that he needed additional training to perform the task.

Defendants' expert, however, testified that a review of exhibits admitted into evidence revealed that Plaintiff had extensive training, some above and beyond industry standard. Defendants' expert further testified that Plaintiff was trained in tightening wires, ratchet replacement and proper rigging. Despite that Plaintiff had not received specific instruction regarding laying jockey wire to an outside barge, Defendants' expert testified that there was no appreciable difference in the method for laying jockey wires to an outside barge and the thousands of other wires Plaintiff laid to the center barge. Defendants' expert stated that, from the evidence including Plaintiff's deposition and training information, Plaintiff's training was adequate to allow him to lay a jockey wire to an outside barge. Defendants' expert's testimony supports the district court's conclusion. Giving due regard to the district court's opportunity to judge the witness' credibility, as we must, we conclude that the district court's findings as to the adequacy of Plaintiff's training were not clearly erroneous.

We next turn to the district court's finding of fact and conclusions of law as to Plaintiff's allegation that Defendants were negligent in failing to provide adequate safety precautions. Specifically, the district court found that

> 20. Although, the ratchet on barge AEP-508 that Plaintiff was using at the time of the accident was older, he determined pursuant to his responsibility as second mate that it was not in need of replacement or repair. Likewise, upon inspection after the accident, Captain Harrington determined the ratchet was not in need of replacement or repair and left it in service for the remainder of the tow. Tow ratchets were removed from barge AEP-508 on January 27, 1998, one of which was determined to be in need of replacement. However, it was not established which ratchet Plaintiff was using on the night of the accident. Accordingly, the Court finds that barge AEP-508 was reasonably safe and fit for its intended purpose on the night of December 28, 1997. No evidence was offered to establish that barge AEP-508 departed in any way from industry standard.
>
> 21. The C.J. Bryan had passed inspection by the Coast Guard under the Responsible Carrier program without suggestion that any modification was needed to the vessel in order for it to be reasonably safe and fit for its intended purpose. The installation of a "rigging" or "safety" deck between the

> towknees [sic] is not required by regulation, nor is it customary or common in the industry on a vessel like the C.J. Bryan. Likewise, the installation of a "safety chain" or grab irons between the towknees [sic] is not required or customary in the industry. Neither the absence of these safeguards, nor the lack of rubber on the towknees [sic], rendered the C.J. Bryan unsafe or unfit for service the night of December 28, 1997.

(J.A. at 39-40.) Here, Plaintiff takes issue with district court's findings and argues that they are based on facts not in evidence. We agree that the district court's findings are unsupported by the evidence in the record.

Plaintiff argues that the district court's finding that *M/V C.J. Bryan* had passed inspection by the Coast Guard and under the Responsible Carrier program without suggestion that modification was needed to the vessel was not supported by the record. Specifically, Plaintiff points to the fact that *M/V C.J. Bryan* is an uninspected vessel, meaning that the Coast Guard does not inspect the vessel for or regulate the construction of safety equipment such as the handrails, safety chains or guardrails about which Plaintiff complains. As an uninspected vessel, federal regulations only require that the vessel have minimal safety requirements such as life

preservers, emergency radio beacons, fire extinguishers, etc.[5] *See* 46 C.F.R. Pts. 24-27.

Although the district court correctly pointed out that there were no regulations or industry practices requiring the presence of safety ropes or handrails, there was no evidence that safety ropes or handrails were inconsistent with custom and practice. The evidence at trial reveals that Defendants installed safety chains and rails in several other areas of the vessel. Moreover, other vessels in Defendants' fleet had safety appliances between the tow knees. Defendants' expert testified at trial that the size of the vessel would prohibit the installation of a safety deck, but conceded that nothing prevents the installation of a safety chain on top of the tow knees. Defendants argue that the inspections of the Responsible Carrier program did not result in recommendations that either safety chains or safety decks be constructed on the ship. However, the testimony does not point to the extent of those inspections and whether the inspections were meant to consider whether safety chains or safety decks were needed.

---

[5] Defendants argue that the Court should not consider these regulations because Plaintiff did not introduce them into evidence below. However, the court sees no difference between these regulations and applicable case law which this Court may consider even though not relied on by either party below. In addition, the record indicated to the district court that the vessel was an uninspected vessel and the district court had at its disposal the regulations indicating the safety requirements of an uninspected vessel.

In addition, there was testimony by Defendants' safety manager that, one month prior to Plaintiff's accident, another worker on the *M/V C.J. Bryan* fell from the tow knee and was injured. Furthermore, Defendants' expert testified that the failure of the ratchet was common in the industry. Based on these facts, we conclude that the district court erred in determining that Defendants were not negligent in failing to provide adequate safety measures. These facts show that Defendants knew of the risk that the ratchet could fail and also knew that a seaman could fall from the tow knee and injure himself; nevertheless, Defendants failed to adequately guard against these risks for the safety of their seamen. Moreover, that Defendants had installed safety ropes in other ships and other areas of the *M/V C.J. Bryan* indicates that it would not have been excessively burdensome in light of the risks to the seamen for Defendants to install safety ropes here. Given that one month prior to Plaintiff's injury another seaman was injured by a fall on the *M/V C.J. Bryan*, we conclude that Defendants were negligent in failing to take adequate safety precautions in the face of the notice of the danger to their seamen.

Similarly, there is sufficient evidence to show that Defendants' failure to provide the safety ropes was the cause, in whole or part, of Plaintiff's injuries. The testimony at trial was that if a safety rope had been in place, Plaintiff would have had something to grab and his fall would have been prevented. We therefore conclude that the district court erred in determining that Plaintiff was not entitled to recover under this theory of negligence.

B.

Under the seaworthiness doctrine, there is an absolute duty to maintain a seaworthy ship, the breach of which imposes liability without fault, i.e., strict liability. *See Brown v. Dravo Corp.*, 258 F.2d 704, 706 (3d Cir. 1958). A shipowner has an obligation to "'furnish a vessel and appurtenances reasonably fit for their intended use.'" *Havens*, 996 F.2d at 217. However, a vessel need not be "free from all possibility of mishap, for the seaworthiness of a ship is a relative concept, dependent in each instance upon circumstances." *Brown*, 258 F.2d at 706. To prove an unseaworthiness claim, a plaintiff must show that the unseaworthy condition of the vessel was the substantial and direct or proximate cause of the plaintiff's injuries. *See Havens*, 996 F.2d at 218.

It is well-settled law that even a temporary or unforeseeable failure of a piece of vessel equipment under proper and expected use is sufficient to establish unseaworthiness provided that the unseaworthy condition was the proximate cause of the harm suffered by the plaintiff. *See Ferrara v. A. & V. Fishing, Inc.*, 99 F.3d 449, 453 (1st Cir. 1996); *Havens*, 996 F.2d at 217-18; *Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196, 199 (1st Cir. 1980); *Tex. Menhaden Co. v. Johnson*, 332 F.2d 527, 528 (5th Cir. 1964). Plaintiff testified that he used the ratchet and attempted to lay the jockey wire in the same manner as always. In addition, Plaintiff's supervisor testified that he saw nothing abnormal, incorrect, or unusual about Plaintiff's performance during the period that he observed him. In the instant case, there is sufficient evidence on the record to conclude that Plaintiff was properly using the ratchet for its intended

purpose when it malfunctioned (Defendants' expert concluded and the district court found that the ratchet malfunctioned).[6]

Furthermore, Plaintiff established that the malfunction of the ratchet was a proximate or a direct and substantial cause of his injuries. Defendants' expert testified that the malfunction of the ratchet was common. Given the manner in which a wire is laid, we find that it was foreseeable that if a ratchet malfunctioned during the laying of a wire, the force resulting from the ratchet could propel a seaman forward and cause injury. It is clear from the evidence that the malfunction of the ratchet was a substantial and direct cause of Plaintiff's injuries. The district court therefore erred in determining that, despite the testimony that the ratchet malfunctioned under normal use, the *M/V C.J. Bryan* and AEP-508 were seaworthy. To the contrary, the record indicates that Defendants failed in their absolute duty to maintain a seaworthy vessel because the ratchet Plaintiff was using on the night of his injury was not reasonably fit for its intended use. *See Hubbard,* 626 F.2d at 200; *Tex. Menhaden Co,* 332 F.2d at 528.

We further conclude that Plaintiff can recover for unseaworthiness on the ground that the *M/V C.J. Bryan* and AEP-508 did not have adequate safety equipment and

---

[6] Unlike a claim under the Jones Act, where a finding of negligence is necessary, the source of the malfunction is irrelevant to an unseaworthiness claim. "Unseaworthiness is a **condition**, and how that condition came into being--where by negligence or otherwise--is quite irrelevant to the owner's liability for personal injuries resulting from it." *Ferrara,* 99 F.3d at 453 (emphasis in original).

therefore were not fit for their intended uses. As discussed earlier, Defendants knew of the dangers of the ratchet failing as well as the dangers of seamen falling on the vessel, having had a seaman injured on the same vessel by a fall just a month prior to Plaintiff's injuries. This evidence is sufficient to show that the *M/V C.J. Bryan* and AEP-508 were unseaworthy and that Defendants were therefore strictly liable for their failure to provide a seaworthy vessel. Plaintiff also showed that the failure to provide adequate safety equipment was at least one of the proximate causes of Plaintiff's injuries inasmuch as it was foreseeable, given the previous fall, that Plaintiff could be injured from a fall on the vessel in light of the failure to provide safety rope or similar equipment.

C.

We now consider Plaintiff's contention that the district court erred in determining that he was negligent in straddling the ratchet. We need not address the district court's **dicta** that Plaintiff's negligence was the sole proximate cause of his injuries inasmuch as we have previously concluded that Defendants' negligence contributed to Plaintiff's injuries.

The district court noted that

> 13. At the time of his injury, Plaintiff was straddling the ratchet with one foot flush to the coaming and the other beside the outside edge of the ratchet. AEP safety rule 1.13 instructs employees not to "straddle wire or ratchets when tightening barge lines." In this context, the Court finds there is no significant difference between tightening barge "lines" and

> tightening barge "wires" as Plaintiff was doing. Plaintiff's own expert testified that it would be "common sense" in the industry not to straddle the ratchet. Rule 1.13 further provides that "employees shall operate the ratchet lever from the inboard side." This means from the side of the ratchet closest to the center of the vessel upon which the employee is standing. When an employee is straddling the ratchet, he is not to the inboard side of the ratchet and is likewise in violation of this latter portion of the rule.
>
> 14. AEP policy also prohibits pushing the cheater pipe past vertical when tightening a wire. Plaintiff learned through on-the-job training and experience that doing so was dangerous because it increases the likelihood of the dog slipping and the operated being thrown off balance. Plaintiff denied pushing the pipe past vertical the night of his injury even though he testified at his deposition that he could not remember whether he had pushed the pipe past vertical.

(J.A. at 35-36.)

We believe that the district court's findings in this respect are unsupported by the evidence and clearly erroneous. Even though Plaintiff was straddling the ratchet, there is not enough information in the testimony to conclude that this position was negligent and that it contributed to Plaintiff's injuries. Plaintiff's expert testified that Plaintiff's straddling position was a more stable position than if he had

not straddled the ratchet. Defendants' expert testified that straddling the ratchet was improper, but on cross-examination admitted that in his deposition he testified that straddling the ratchet, i.e., placing Plaintiff's legs farther apart, provided a more stable platform. In the face of this uncontradicted evidence from Plaintiff's expert and Defendants' expert's more contradictory statements, we believe that the district court clearly erred in finding that Plaintiff was negligent in straddling the ratchet simply because it violated AEP policy. There appears to be no support in the law for the proposition that the violation of company policy alone constitutes negligence.

We decline to entertain Defendants' argument that Plaintiff was negligent in pushing the ratchet past vertical because the district court did not draw such a conclusion. At most, there is only evidence that Plaintiff did not know whether he pushed the ratchet past vertical; there is no evidence to show that he actually pushed the ratchet past vertical. Furthermore, the evidence on the record shows that even if Plaintiff had actually pushed the ratchet past vertical, it would not constitute negligence. In Defendants' own exhibit, purporting to show the correct way of laying the wire, the deck hand there pushed the ratchet beyond vertical.

However, even if the district court had properly concluded that Plaintiff was negligent, we find that his negligence would not bar his recovery, but only reduce his damages under the theory of comparative negligence under the Jones Act.

II.

Plaintiff next contends that the district court abused its discretion in denying his motion to amend his complaint, to extend discovery and to continue the trial date. We find no such abuse of discretion.

We review the district court's denial of Plaintiff's motion to amend his complaint for abuse of discretion. *See Gen. Elec. Co. v. Sargent & Lundy,* 916 F.2d 1119, 1130 (6th Cir. 1990). Similarly, we review the district court's denial of discovery for abuse of discretion. *See United States v. Jones,* 159 F.3d 969, 977 (6th Cir. 1998). Likewise, the denial of a motion for continuance of trial is reviewed for abuse of discretion. *See Scholl v. Felmont Oil Corp.,* 327 F.2d 697, 700 (6th Cir. 1964).

Plaintiff filed his complaint on January 21, 1998. A calender order, entered April 23, 1998, set the deadline for amending the complaint for May 20, 1998, and the deadline for discovery for December 31, 1998. The parties later entered a stipulation extending discovery to July 30, 1999. Plaintiff filed his motion to amend his complaint, extend discovery, and continue the trial on July 6, 1999. Plaintiff argued that he should be allowed to amend his complaint to reflect information found through discovery. Specifically, Plaintiff stated that he learned that the cheater pipe Plaintiff used had been manufactured by Defendant AEP; he had learned the identity of the manufacturer of the ratchet, whom he wanted to add as a party; and that depositions were still not complete due in part to the debilitating health of Plaintiff.

The district court issued an order denying Plaintiff's motion. The court's order stated it had advised Plaintiff of the deficiencies in his complaint four months prior to his motion and invited Plaintiff to amend his complaint at that time, but Plaintiff declined to do so. The court noted that "Plaintiffs have waited until the eleventh hour to move for an extension, a continuance and a leave to amend their complaint. None of the matters raised in support of their Motion should have come as a surprise to Plaintiffs." (J.A. at 30-31.) The Court also found that

> They assert that Plaintiff James W. Perkins' medical condition has changed and will continue to change, that the discovery is not yet complete, and that an amendment of the complaint would permit them to add specific allegations related to matters learned in recent discovery. To the extent that these matters learned in recent discovery are germane to Plaintiffs' existing claims, Plaintiffs need not amend their complaint add those matters. To the extent that Plaintiffs wish to assert new claims, they have not identified those claims or provided a justification for their failure to seek leave to do so at an earlier time. With the exception of matter related to Plaintiff James W. Perkins' medical condition, Plaintiffs have not identified matters concerning which additional discovery should be permitted. With regard to matters related to Mr. Perkins' medical condition, Plaintiffs will be required, as is often the case in actions involving bodily injuries, to present evidence related to the

> injuries, Mr. Perkins' current condition, and his prognosis. Plaintiffs have not demonstrated they will be unable to do so if the Court does not grant the requested extension and continuance. For all of those reasons, Plaintiffs' Motion is denied.

(J.A. at 30-31.)

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend should be freely granted when justice so requires. *See* Fed. R. Civ. P. 15(a). In deciding whether to allow an amendment, the court should consider the delay in filing, the lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment. *See Gen. Elec. Co.*, 916 F.2d at 1129. Here, there is evidence of delay, but Defendants have not alleged that they have been prejudiced by any proposed amendment. Nevertheless, we note that the court only four months earlier gave Plaintiff an opportunity to cure deficiencies in his complaint and Plaintiff declined to do so. Having found that Plaintiff had not shown justification for an amendment to add new claims or new parties to his complaint, the district court did not abuse its discretion in denying the motion to amend.

In addition, the district court did not abuse its discretion in denying Plaintiff's motion to continue the trial and extend discovery. As to discovery, the court noted that Plaintiff had not shown what information or discovery was needed and how it would be relevant or beneficial to Plaintiff's case. Moreover, the discovery period in this case

had already lasted over a year. And Plaintiff waited until less than three months prior to the start of trial to file his motion. Under these circumstances, the district court did not abuse its discretion in denying further discovery. *See e.g., Lewis v. ACB Bus. Serv., Inc.,* 135 F.3d 389, 402-03 (6th Cir. 1998). As to Plaintiff's motion to continue the trial, Plaintiff has failed to show that he was actually prejudiced by district court's denial of his motion, that additional time would have produced additional witnesses or evidence for Plaintiff's case; absent such a showing, Plaintiff cannot claim that the district court abused its discretion. *See United States v. Martin,* 740 F.2d 1352, 1360-61 (6th Cir. 1984).

CONCLUSION

We therefore conclude that the district court did not err in denying Plaintiff recovery under the Jones Act based on claims that Plaintiff was inadequately trained or that the ratchet he worked with was defective; nor can Plaintiff recover under the unseaworthiness doctrine based on his inadequate training theory. However, we conclude that the district court erred in denying Plaintiff recovery under the Jones Act since Plaintiff proved that Defendants were negligent in failing to provide adequate safety precautions to prevent Plaintiff's injuries and that Defendants' negligence was a cause of Plaintiff's injuries. Likewise, the district court erred in denying Plaintiff recovery under the unseaworthiness doctrine inasmuch as the record indicates that Plaintiff proved that Defendants failed to provide vessel equipment, in this case a ratchet, reasonably fit for its intended purpose and take adequate safety precautions for Plaintiff's safety. The failure of the ratchet and the inadequate safety precautions were a proximate or direct and substantial cause of Plaintiff's

injuries, thereby making Defendants strictly liable under the unseaworthiness doctrine for Plaintiff's injuries.

We further conclude that Plaintiff failed to establish that the district court abused its discretion in denying his motion to amend his complaint, to extend discovery, and continue the trial date.

Accordingly, we **REVERSE** in part and **AFFIRM** in part the district court's judgment entered against Plaintiff and **REMAND** for a hearing on the issue of damages to the extent necessary; we also **AFFIRM** the district court's order denying Plaintiff's motion to amend his complaint, extend discovery, and continue the trial.

CONCUR BY:
SILER

CONCUR:

SILER, Circuit Judge, concurring. I concur in most of the conclusions reached by the majority in this case. However, I disagree with the conclusion that the district court clearly erred in denying recovery under the Jones Act. Although the majority makes out a good case for concluding that defendant was negligent in failing to provide adequate safety precautions, this is a finding of fact. There was a basis for the district court to find that the ship owner was not negligent by failing to have safety ropes or handrails. "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. City*

of Bessemer City, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). Similarly, I would not find that the vessel and the barge were unseaworthy because there was not adequate safety equipment as the failure to have certain safety equipment was also a finding of fact, which I think was not clearly erroneous.

Nevertheless, I agree with the majority in its conclusion that the vessel and barge were unseaworthy because the ratchet was not reasonably fit for its intended use. Truly, like negligence, seaworthiness is usually a finding of fact. *See Mahnich v. Southern S. S. Co.,* 321 U.S. 96, 98, 88 L. Ed. 561, 64 S. Ct. 455 (1944). However, the malfunction of the ratchet shows that it was not reasonably fit for its intended use, so the vessel was not seaworthy. *See Hubbard v. Faros Fisheries, Inc.,* 626 F.2d 196, 199 (1st Cir. 1980). Therefore, the malfunction of the rachet was a substantial and direct cause of the injuries to Perkins.

In conclusion, I would also reverse and remand but only on a narrower basis than determined by the majority.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed May 24, 2001]
No. 99-4500

JAMES W. PERKINS
Plaintiff-Appellant,

JUDITH LYNN PERKINS,
Plaintiff,

v.

AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., ET AL.,
Defendants-Appellees.

ORDER

BEFORE: NELSON, SILER, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for

rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed November 24, 1999]
C-1-98-64

JAMES W. PERKINS, et al.,
Plaintiff(s),

v.

AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., et al.,
Defendant(s).

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS ENTERED **IN FAVOR OF DEFENDANT'S** ON EACH OF PLAINTIFF'S CLAIMS AND THIS ACTION IS CLOSED PURSUANT TO ORDER OF THE COURT [DOC. 56].

November 24, 1999

/s/_____
Kenneth Murphy, Clerk
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed November 24, 1999]

Case No. C-1-98-064

James W. Perkins, et al.,
Plaintiffs,

v.

American Electric Power Fuel Supply, Inc., et al.,
Defendants.

Findings of Fact and Conclusions of Law

A. Findings of Fact

The Court makes the following findings of fact based on a preponderance of the evidence submitted at the trial of this matter on the merits:

1. At the time of his injury, Plaintiff James Perkins ("Perkins") was a "seaman" as defined in the Jones Act, 46 U.S.C. §688.

2. Defendant American Electric Power ("AEP"), River Division, was Plaintiff's *"employer"* at the time of his injury pursuant to the Jones Act, 46 U.S.C. §688.

3. Plaintiff began working for AEP in 1980 as a deckhand, and in 1988 was promoted to second mate. As second mate, Plaintiff was responsible for seeing that wires, ratchets and rigging were properly placed on the tow in accordance with captain's orders and for ensuring that rigging and ratchets were inspected prior to use and replaced or repaired if necessary.

4. On December 28, 1997, the date of his injury, Plaintiff was working as a second mate aboard the motor vessel *C.J. Bryan.* The *C.J. Bryan* is a line haul towing vessel used to move 15-barge tows on the lower Ohio River.

5. Plaintiff's supervisor on December 28, 1997, was Captain Jerhald Harrington, the master of the vessel. Plaintiff had worked for Captain Harrington on other occasions in the past.

6. Captain Harrington instructed Plaintiff when he began his hitch on the *C. J. Bryan* that *"jockey"* (also known as *"rock* and roll") wires should be laid from each towknee to the outside (starboard and port) barges at the stern of the tow. This is not an unusual practice in the towing industry, particularly on the lower Ohio River where the accident occurred. Plaintiff's expert agreed that the decision of whether to use jockey wires is a decision best left to the discretion of the captain. The Court finds that Captain Harrington acted within his discretion in ordering jockey wires to be laid on December 28, 1997. His order did not present an

unreasonable risk of injury to the crew.

7. At the time of the accident, Plaintiff was in the process of laying a jockey wire to an outside barge by tightening an AEP stationary ratchet located on the port stern of barge AEP-508, using an AEP fabricated "cheater pipe." The use of cheater pipes to gain additional leverage in tightening stationary ratchets is a standard and common practice in the industry.

8. Prior to tightening the ratchet, Plaintiff properly inspected the ratchet in a manner sufficient to satisfy his duty as second mate. He determined that the ratchet was in serviceable condition and was not in need of replacement or repair. New ratchets were available aboard the *C.J. Bryan,* had Plaintiff determined the ratchet was excessively worn or otherwise defective.

9. Plaintiff cranked the stationary ratchet toward the deck of the *C.J. Bryan,* outboard from the barge upon which he was standing. AEP safety rule 1.13 requires that ratchets be placed on barges so they will tighten inboard. However, by implication, the Court finds this rule to apply only to situations where the employee is using a portable ratchet which is capable of being "placed." The stationary ratchet used by Plaintiff on the night of his injury was permanently affixed to the vessel by the manufacturer and incapable of being "placed" in such a way as to tighten inboard. Accordingly, when Plaintiff laid and tightened the jockey wire pursuant to Captain's orders, he was not in violation of this safety rule.

10. Opposite the deck, on the other side of Plaintiff, was an open hopper cargo box. This opening would have presented a similar danger to Plaintiff, had he chosen to use a portable ratchet, which was also available aboard the C.J. *Bryan,* and cranked in the opposite direction, inboard toward the barge and the empty cargo box.

11. Plaintiff cranked the jockey wire substantially tight and was pushing on the cheater pipe with significant force when the gear or "dog" of the ratchet "slipped" or came out of gear, causing the tension on the cheater pipe to give way. Although ratchets with worn gears or those with debris like coal or ice in the gears are more likely to slip, a ratchet in perfect condition can slip despite the use of proper technique, as illustrated in the video proffered by Defendants. Accordingly, simply because the dog on a ratchet slips does not indicate the ratchet was defective, improperly inspected for debris, or improperly employed by the operator.

12. As a result of the dog slipping on the night of December 28, 1997, Plaintiff lost his balance and his momentum carried him over the edge of barge AEP-508 onto the deck of the C.J. Bryan, a distance of eight to nine feet. Plaintiff was severely injured in the fall.

13. At the time of his injury, Plaintiff was straddling the ratchet with one foot flush to the coaming and the other beside the outside edge of the ratchet. AEP safety rule 1.13 instructs employees not to "straddle wire or ratchets when tightening barge lines." In this context, the Court finds there is no significant difference between tightening barge "lines" and tightening barge "wires" as Plaintiff was doing. Plaintiff's own expert testified that it would be "common

sense" in the industry not to straddle the ratchet. Rule 1.13 further provides that "employees shall always operate the ratchet lever from the inboard side." This means from the side of the ratchet closest to the center of the vessel upon which the employee is standing. When an employee is straddling the ratchet, he is not to the inboard *side* of the ratchet and is likewise in violation of this latter portion of the rule.

14. AEP policy also prohibits pushing the cheater pipe past vertical when tightening a wire. Plaintiff learned through on-the-job training and experience that doing so was dangerous because it increases the likelihood of the dog slipping and the operator being thrown off balance. Plaintiff denied pushing the pipe past vertical the night of his injury even though he testified an his deposition that he could not remember whether he had pushed the pipe past vertical.

15. At the time of Plaintiff's injury, Captain Harrington was in the pilothouse. Captain Harrington watched Plaintiff lay the jockey wire and begin to tighten it. While he watched, he did not see Plaintiff push the cheater bar past vertical or engage in any other unsafe conduct. Plaintiff's stance at the time met with Captain Harrington's approval. However, no evidence was presented to establish that Plaintiff was straddling the ratchet at the time. Had Captain Harrington seen Plaintiff engage in any unsafe conduct, he would have been required to interrupt Plaintiff's work and correct his method. At no time did the Captain stop Plaintiff in his work the night of the accident.

16. In the moments prior to the accident, Captain Harrington turned away to attend to something else and did not observe Plaintiff's technique or stance when the tension on

the cheater pipe released. Due to Plaintiff's extensive experience and training as a second mate, Captain Harrington was not under any obligation to watch Plaintiff complete the tightening process. Therefore, Captain Harrington's conduct in turning away from Plaintiff was reasonable and demonstrated ordinary care under the circumstances.

17. Plaintiff was an experienced seaman. He received on-the-job training which is consistent with the custom and practice in the river towing industry. In addition, during his seventeen years with AEP, Plaintiff attended safety meetings on at least a monthly basis. When Captain Harrington was aboard the vessel, Plaintiff attended safety meetings on a weekly basis. Some of these meetings included instruction and warnings regarding the safe use of ratchets, cheater pipes and other rigging.

18. Moreover, Plaintiff had significant experience in laying and tightening jockey wires. Having laid 50-100 such wires before the night of his injury, he was familiar with the risks and dangers associated with that type of wire. Although Plaintiff testified that this was the first time he had laid the wires to the outside barges, as opposed to a center barge, the Court finds this configuration did not change the way in which the wires were tightened or the way the ratchet was positioned and cranked. Moreover, Plaintiff had laid thousands of other wires, an least some of which had required him to tighten the ratchet toward an empty cargo hopper or toward the edge of a barge exposing him to comparable danger, which would have given him similar training and experience. The Court finds Plaintiff had adequate training and experience to safely lay the jockey wire on the night of his injury.

19. Plaintiff was aware of AEP safety rules and understood that pursuant thereto, he was required to bring any unsafe condition to the attention of his supervisor, Captain Harrington. The night of his injury, Plaintiff did not alert the Captain to any unsafe condition.

20. Although the ratchet on barge AEP-508 that Plaintiff was using at the time of the accident was older, he determined pursuant to his responsibility as second mate that it was not in need of replacement or repair. Likewise, upon inspection after the accident, Captain Harrington determined the ratchet was not in need of replacement or repair and left it in service for the remainder of the tow. Two ratchets were removed from barge AEP-508 on January 27, 1998, one of which was determined to be in need of replacement. However, it was not established which ratchet Plaintiff was using on the night of the accident. Accordingly, the Court finds that barge AEP-508 was reasonably safe and fit for its intended purpose on the night of December 28, 1997. No evidence was offered to establish that barge AEP-508 departed in any way from industry standard.

21. The *C.J. Bryan* had passed inspection by the Coast Guard and under the Responsible Carrier program without suggestion that any modification was needed to the vessel in order for it to be reasonably safe and fit for its intended purpose. The installation of a "rigging" or "safety" deck between the towknees is not required by regulation, nor is it customary or common in the industry on a vessel like the *C.J. Bryan*. Likewise, the installation of a "safety chain" or grab irons between the towknees is not required or customary in the industry. Neither the absence of these safeguards, nor the lack of rubber on the towknees, rendered the *C.J. Bryan*

unsafe or unfit for service the night of December 28, 1997.

B. Conclusions of Law

I. Pursuant to the Jones Act, an employer is liable for injuries sustained by an employee where the employee can show that the employer's negligence played a role, even the slightest, in producing the injuries for which he seeks damages. See Ferguson v. Moore-McCormack, 352 U.S. 521 (1957).

2. Proof of negligence is an essential element of a Jones Act claim. Accordingly, while the employer's negligence need only be shown to play a slight part in producing the injury, the plaintiff must nevertheless demonstrate that the employer was negligent in some respect. See Jacob v. New York, 315 U.S. 752 (1952); Ferguson, 352 U.S. at 523; Daughenbrauh v. Bethlehem Steel Corp., 891 F.2d 1199 (6th Cir. 1989); Merlino v. United States Steel Corp., No. 93-2403, 1995 U.S.App. LEXIS 8101, (6th Cir. April 6, 1995) (unpublished) .

3. Defendant AEP's fundamental duty under the Jones Act was to provide Plaintiff with a reasonably safe place to work. See Yehia v. Rouge Steel Corp., 898 F.2d 1178, 1184 (6th Cir. 1990). Defendant is not required, however, to ensure the absolute safety of its employees under the Jones Act and need not provide an "accident-proof" ship. Rather, the duty is that of ordinary care in providing a reasonably safe place to work under the circumstances. See Alrayashi v. Rouge Steel Co., 702 F. Supp. 1334, 1336 (E.D. Mich. 1989).

4. In this case, the Court concludes that Plaintiff has failed to prove that Defendant AEP breached its duty of care to Plaintiff or was negligent in any respect. As set forth above in the Court's findings of fact, Plaintiff was provided with satisfactory equipment on the night of his injury, he was given adequate training and supervision given his experience, and he was provided a reasonably safe place to work. Accordingly, Plaintiff has failed to prove a claim against Defendant under the Jones Act.[1]

5. Pursuant to general maritime law, Defendant was further required to provide Plaintiff with seaworthy vessels upon which to work. This duty applied to both the *C. J. Bryan* and barge AEP-508. The employer's duty to provide a seaworthy ship is "absolute and completely independent of his duty under the Jones Act to exercise reasonable care." Mitchell v. Trawler Racer Inc., 362 U.S. 539, 549 (1960); Mahnich v. Southern S.S. Co., 321 U.S. 96, 102 (1944).

6. Because it is a "species of liability without fault," the unseaworthiness doctrine is a "strict liability rule." Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 208, (1996) (quoting Seas Shipping Company v. Sieracki, 328 U.S. 85, 94 (1946)); Olsen v. American Steamship Company, 176 F.3d 891, 895 (6th Cir. 1999). Defendant need not have been aware of the unseaworthy condition or negligent in any way to be found liable for Plaintiff's injuries.

---

[1] Plaintiff's own negligence in straddling the ratchet contrary to AEP policy was likely the sole proximate cause of his injury, although the Court need not reach that conclusion here.

7. A seaworthy vessel is one which is reasonably fit for its intended purpose, or reasonably safe for the work being performed. The employer is not required to provide its employees with the best vessel or equipment, or with a perfect vessel, but with a vessel that is reasonably fit and safe. See Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960); Alrayashi v. Rouge Steel Co., 702 F. Supp. 1334, 1337 (E.D. Mich. 1989).

8. Compliance with industry practice and custom, while not conclusive, is relevant to the court's consideration of seaworthiness. See Roberge v. Hannah Marine Corp., No. 96-1691, 1997 LEXIS 30706 (August 13, 1997 6th Cir.) (unpublished); Cherokee Ins. Co. v. E.W. Blanch Co., 66 F.3d 117, 123 (6th Cir. 1995). As set forth in this Court's findings of fact, the C.J. Bryan and barge AEP-508 were in compliance with industry practice and custom on the night of Plaintiff's accident.

9. Therefore, in order to recover for an unseaworthy condition, Plaintiff must prove that the vessel(s) in question or their appurtenances or equipment were not reasonably fit or safe, despite compliance with industry custom or practice. Plaintiff must further prove by a preponderance of the evidence that any such unseaworthy condition was a proximate cause of his injuries. See Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Alrayashi v. Rouge Steel Co., 702 F. Supp. 1334 (E.D. Mich. 1989).

10. The Court concludes that Plaintiff has failed to carry this burden. Plaintiff did not demonstrate that the lack of a safety deck, chain rail or grab irons between the towknees or lack of rubber on the towknees rendered the vessel unfit or

unsafe for its intended purpose on the night of December 28, 1997. Plaintiff likewise failed to establish that barge AEP-508 was unfit or unsafe on the night of his accident, as set forth in the findings of fact. Accordingly, the Court concludes that both the *C.J. Bryan* and barge AEP-508 were seaworthy on the night in question.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT

1. Judgment is entered in favor of Defendants on each of Plaintiff's claims.

2. This action is hereby closed.

Dated: 11/22/99

/s/_____
Sandra S. Beckwith
United States District Court Judge

APPENDIX E

The Jones Act, 46 U.S.C. App. § 688

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under

subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred–

> (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources--including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person–

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[September 20, 1999]
No. CIVIL 1-98-64

JAMES W. PERKINS,
PLAINTIFF,

v.

AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., ET AL.,
DEFENDANTS.

Trial to the Bench
for the Southern District of Ohio at Cincinnati,
Sandra S. Beckwith, District Judge

VOLUME I COMPUTERIZED TRANSCRIPT
Beverly W. Dillman,
Federal Court Reporter

APPEARANCES:

MEREDITH LYNN LAWRENCE, ATTORNEY AT LAW JAMES BURDETTE HELMER, JR., ATTORNEY AT LAW

ON BEHALF OF THE PLAINTIFF.

TODD MATTHEW POWERS, ATTORNEY AT LAW

ON BEHALF OF THE DEFENDANTS.

...

[53]

handrail stanchion, over to the other tow knee handrail stanchion?

A When they are pushing barges, on our barges, we have white lines painted around the exterior of the barges, so we have a warning -- a warning sign signal, we have a warning device that they are getting near the edge of the barge. And so we are using that, you know, to -- so --

Q Well, they aren't allowed to step on the white line on the barge. That's too close to the edge, right?

A Yes. That's a warning.

Q Yes. So they have got to stay inside the white line to work?

A Yes.

Q Now, is there any reason you know of, sir, based on your experience since 1989 with these tow boats, that a safety chain or grab iron, safety chain's all I know to call it, like is down low, cannot be positioned up high for the empties?

A I don't know if that would be useful or not. I mean, I don't know if it would be in the way. I am not for sure.

Q Do you recognize that the decks of an empty barge, when faced up to the tow knees of the C. J. Bryan, that that boat has no guard of any kind for those people at that level?

A At that level, yes, sir.

Q Sir, in your experience, and based on your understanding of the job responsibilities that you have, being in charge of [54] safety at AEP's River Transportation Division, does the absence of a safety chain at tow knee level from handrail to handrail, from the tow knees, cause you concern?

A If you're relating it to Wes's accident, I don't know. But we have worked for 25 years in this fashion with this vessel, and we have not experienced this type of problem.

Q Are you saying no one has ever fallen from the tow knee level?

A Not that I am aware of.

Q Sir, isn't it true that on November 29th, 1997, John Ace Adams, a striker aboard the C. J. Bryan, fell from this tow knee onto the starboard side, and you investigated it?

A He didn't fall.

Q What happened?

A He stepped backwards and slipped down.

Q Okay. But he went down to the steel, didn't he?

A Yes, sir.

Q And he was injured?

A He had some bruises, yes, sir.

Q And he lost time and went to the doctor and got medical treatment?

A And went back to the boat.

Q Did you board the vessel when you investigated -- first of all, let me establish you did investigate that case?

A I talked to the captain and I talked to the employee.

[55]

Q Did you ask the captain if there was anything up there for him to grab onto; Mr. Adams?

A No, sir, I didn't ask that question.

Q Did you go to the boat to see if there was anything for him to grab onto?

MR. POWERS: Objection, Your Honor.

THE COURT: Sustained.

BY MR. LAWRENCE:

Q Sir, did you say that for 25 years AEP has operated in this fashion, with no safety device for people working on empty barges?

A No, I am saying that the C. J. Bryan, that we have operated that boat for 25 years -- well, since 1976-1977, so that would be what, 22, 23 years. And we have not had a chain against -- across the top of the tow knees.

Q But isn't it true that you do on some of your line haul vessels, or at least one, provide something called a safety deck that covers this area between the tow knees in case people fall off empty barges?

A On our smaller vessels, yes, they have a working platform that extends out to the tow knees.

Q Yes, sir. And that working platform is at about tow knee level or a little under?

A It's below the top of the tow knee level, if I recall.

Q And that motor vessel is at least the Motor Vessel Safety

...

[130]

Thank you, Captain.

THE COURT: Mr. Powers?

MR. POWERS: Thank you, Your Honor.

- - -

CROSS-EXAMINATION

BY MR. POWERS:

Q Captain Harrington, you were asked the question what you saw that night, and I want to follow up on that a bit.

A Yes, sir.

Q When you saw Wes Perkins tightening the ratchet --

A Yes, sir.

Q -- did you see him complete the job?

A No, sir.

Q And when you last saw him tightening the ratchet, had you seen him at any point take the cheater pipe and go beyond vertical?

A No, sir.

Q Had you seen him do that, what would your response have been, sir?

A I would have alerted him.

Q Alerted him?

A I would have alerted him. I would have stopped him.

Q And why is that?

A Well, there again, we are looking at the balance factor, Mr. Powers, and this is what we try to do is have a rhythm, a [131] method of tightening. Wes was getting somewhere near snug or tight, because he was beginning to put a little muscle on it the last time I saw him. But at that point, no, sir, he still wasn't coming over center with the breaker bar, the cheater bar.

Q Have you tightened ratchets before, sir?

A Have I?

Q Yes, sir.

A Yes, sir, many.

Q Have you tightened a ratchet in the fashion Mr. Perkins was using it that night?

A Yes, I have.

Q And can you tell us, and tell the Court, please, Captain Harrington, that if -- whether if Mr. Perkins were indeed tightening that ratchet and stopping at vertical, as we have described, had the dog slipped, would the force have propelled him over the side of that barge, in your experience?

A No, sir. No, sir.

MR. LAWRENCE: Objection, Your Honor, leading.

THE COURT: Overruled.

BY MR. POWERS:

Q Your answer, please? Just so that we have your answer for the record.

THE COURT: It's all right, Mr. Powers, I have got it.

[132]

MR. POWERS: Did you hear it? Okay, thank you.

BY MR. POWERS:

Q I want to talk to you a little bit about Wes Perkins. You had worked with Mr. Perkins before?

A Yes, sir.

Q How would you -- I think on the river there is a term "green"; are you with me?

A Yes, sir.

Q Was he green?

A No, sir.

Q Was he experienced, on the other end?

A Yes, sir.

Q As second mate, did Mr. Perkins have duties from time to time of training green deck hands?

A Possibly.

Q Do you know one way or the other?

A No, sir, I don't.

Q Is that a typical duty for a second mate --

A Yes, sir.

Q -- at AEP?

As captain aboard the MV C. J. Bryan on December 27th, I am sorry, December 28th, 1997, would you have allowed a brand new green deck hand to do the work that

Wes Perkins was doing?

A No, sir.

...

[139]

that that wouldn't be practical. Could you tell us, please, why that wouldn't be practical.

A Well, I made that statement that I don't -- I don't see the purpose of it in that position, other than being a chain across the uppermost part of the handrail to the towing knee, I just don't see the purpose of it, sir.

Q Would it interfere with the crew members' ability to get on and off the tow?

A Question again, please?

Q Would it interfere with the crew members' ability to get on and off the tow, as described by Mr. Lawrence, if it went tow knee to tow knee?

A No, sir.

Q Well, how would you get down the steps?

A Well, there again, the position of the chain, what part of the towing knee, from the handrail? You've lost --

Q Well, I guess what I am trying to find out, Captain, is wouldn't you -- if you didn't go from railing to railing, wouldn't you have to have another piece of equipment, a stanchion, a piece of metal, a pole?

A Yes, sir.

Q And what would the practicality be of putting that on the tow knee?

A Well, it would -- to me, it would be adding to the risk factors, Mr. Powers.

[140]

Q And why is that?

A Well, we are handling more equipment.

Q You have been serving on vessels on the inland waterway for, did you say, over 40 years?

A Yes, sir.

Q How long have you been using jockey wires, sir?

A Since Day One, sir.

Q Have you ever seen, in that 40 years, a crew member fall, as Wes Perkins did, tightening such a wire?

A No, sir.

MR. POWERS: Those are all the questions I have.
Thank you, Captain.

MR. LAWRENCE: I have nothing further, Your Honor. Thank you.

THE COURT: Okay. Thank you.

Thank you, Captain. You can step down.

Mr. Powers, does the Captain need to remain available for recall?

MR. POWERS: He does not, as far as we are concerned.

MR. LAWRENCE: No, Your Honor.

THE COURT: Okay. Thank you, sir. You are excused.

MR. LAWRENCE: Thank you.

MR. POWERS: Thank you, Captain.

[141]

THE WITNESS: Excused?

MR. POWERS: You're excused. Thank you, sir.

(Witness excused.)

THE COURT: Mr. Lawrence, we normally would break at 4:30, but if you have got someone you want to put on and go until 5:00, that's fine. It's --

MR. LAWRENCE: Your Honor, this is -- I am sorry. We are ahead of schedule on my plan, Your Honor, so I think we are doing great. I would love to break now, if it's all right with the Court.

MR. POWERS: I have got no objection to that, Your Honor.

THE COURT: Second question, we normally would start, if we had a jury, at 9:00 o'clock. But we can start earlier if you want to, if there is any purpose to be served.

MR. POWERS: Your Honor, I am at -- as far as I am concerned, our witnesses are here in a hotel, and I can be here when the Court deems appropriate.

MR. LAWRENCE: 9:00 would be better for us, Your Honor. We are about 40 miles away, so --

THE COURT: Oh, all right, fine. Well, then we will be in recess until 9:00 o'clock tomorrow morning. Have a nice evening. See you then.

THE CLERK: All rise. This court is now adjourned until 9:00 a.m. Tuesday.

...

[143]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[September 21, 1999]
No. CIVIL 1-98-64

JAMES W. PERKINS,
PLAINTIFF,

v.

AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., ET AL.,
DEFENDANTS.

Trial to the Bench
for the Southern District of Ohio at Cincinnati,
Sandra S. Beckwith, District Judge

VOLUME II COMPUTERIZED TRANSCRIPT

Beverly W. Dillman,
Federal Court Reporter

APPEARANCES:

MEREDITH LYNN LAWRENCE, ATTORNEY AT LAW JAMES BURDETTE HELMER, JR., ATTORNEY AT LAW

ON BEHALF OF THE PLAINTIFF.

TODD MATTHEW POWERS, ATTORNEY AT LAW

ON BEHALF OF THE DEFENDANTS.

...

[177]

BY MR. LAWRENCE:

Q Could you repeat your answer, please?

MR. POWERS: Or have the court reporter read it back? I couldn't hear it.

THE WITNESS: Yes. Yes. I said when we tightened the winch wires, it pulled the stern two outside barges back just enough to loosen the jockey wire. The way I normally hook it, which you can get by with hand tightening, is to place it on the center barge. And the capstan wires, when you tighten it up, it pulls the head of the boat up and brings the rock and roll wires tight.

BY MR. LAWRENCE:

Q But this night --

A It was set to the outside. They don't show facing up, where you would see that the wire would be loose.

MR. POWERS: Thank you very much.

MR. LAWRENCE: Yes, sir.

BY MR. LAWRENCE:

Q Stop right there, please. You see these here?

A Yes, sir.

Q These chains. And those are called what, please?

A Guard chains.

Q Okay, go forward, please. Stop there, please. Can we back up just a little bit? Stop there. Thank you. Can you tell the Court where you hit the main deck [178] at here in this picture.

A About where that lock line is coiled up.

Q Here, over on the left of the screen?

A Yes, sir.

Q Thank you.

Stop there, please.

Is this the ratchet that was laying there? Is this ratchet in the position that it was there on the C. J. Bryan December 28th, 1997?

A Yes, sir.

Q What do you call this ratchet? Is there a name for it?

A Stationary.

Q That's all I have for this. Thank you. Thank you.

Mr. Perkins, you have said that you stood in the way you stood that night to hold the dog, or to push the dog?

A Yes, to lock the dog in place.

Q Would you tell the Court what you do when you lock the dog in place with this stationary rigging, please.

A Well, I crank the ratchet back, I take my left foot and I hit the dog down to seat it properly. And it's just a safety method I came up with. It's safe to me.

Q To take your foot off the deck and put it on the dog?

A Yes, to seat the dog. Then my foot goes back down.

Q Okay. Now, did anyone teach you that?

A No, sir. I have -- I have had a lot of ratchets kick out [179] on me. If they don't seat properly, they will kick out.

Q And if you do what you just said, pick up your foot and seat that dog, does that help it from kicking out?

A Most generally.

Q All right. Now, excuse me, we have looked at this tape before; haven't we?

A Yes, sir.

Q Can you tell the Court if there is a part of this tape

where the dog kicks out on this?

A Yes, sir, there is one spot where the mate, Bob Baldwin, is tightening, and it kicks out. And it hasn't even made it to vertical position yet.

Q By "vertical position," you mean the cheater pipe hasn't come up to the top?

A The cheater pipe hasn't even made it straight up yet.

Q And you can see that in that tape?

A I -- yes, sir.

Q When the ratchet dog jumped, did it knock you off balance?

MR. POWERS: Objection, Your Honor.

THE COURT: Sustained.

BY MR. LAWRENCE:

Q When you were tightening the ratchet, did the ratchet you were using's dog jump?

MR. POWERS: Objection, Your Honor.

[180]

THE COURT: Sustained.

BY MR. LAWRENCE:

Q What caused you to lose your balance that night?

MR. POWERS: Objection, Your Honor.

THE COURT: Sustained.

BY MR. LAWRENCE:

Q On the evening that you were injured, Mr. Perkins, are you able to tell, based on your work that night with that ratchet, if anything happened to the ratchet unusual?

A Yes, sir. The dog kicked out, threw me off balance, I went nine foot to the deck.

Q When you were off balance, did you try to regain your balance?

MR. POWERS: Objection, Your Honor.

THE COURT: Overruled. I will permit it.

THE WITNESS: Oh, yes. I tried to gain balance. I was reaching in the air for anything I could grab, and I had time to think about the fall that I was about to take.

BY MR. LAWRENCE:

Q Were you able to help yourself in gaining balance in any way?

A Just waving my hands. I -- I mean, I wasn't tumbling head over heels. I was standing up straight, but I was at the edge and went over.

Q After you went over the edge, before you hit the deck,

...

[208]

Q Mr. Perkins, during your deposition you were asked the following question and gave the following answer, isn't that correct, you were asked: And have those safety meetings included safety tips and warnings and instructions about handling rigging and using cheater pipes?

Answer: Yes.

A That's what I say on my -- yes, sir.

Q All right. So you do recall that you received safety tips concerning handling rigging, tightening ratchets and using cheater pipes; is that accurate?

A Safety meetings consist of one or more things. They have other safety meetings besides on the boat. I have been to company safety meetings. The one that -- where you said I had deck hand training was not on a boat. It was at the Lakin office or Holiday Inn.

Q You know, maybe I am not clear in my questioning, Mr. Perkins, and I don't mean to do that. But what I am trying to find out is, isn't it fair that at some point in time, before your accident, you had been given safety meetings that

included safety tips and instruction on how to safely tighten ratchets using cheater pipes?

A That's what I say in my deposition.

Q That's right, that is what you said; isn't it?

A Yes, I see that.

Q Now, you became a mate in 1990; correct?

[209]

A I don't really know the exact date.

Q Well, you said it was approximately eight years?

A Eight years, yes.

Q So it might have been 1989, 1991, but somewhere around there?

A Yes, sir. Yes, sir.

Q And when you became a mate, you got that promotion at least in part because you had demonstrated to the company that you could work safely doing the tasks that you needed to do; isn't that fair?

A I have no -- I thought it was by seniority.

Q Seniority?

A I am at least -- the union, through the union, you're at least a chance. If you get -- if you don't qualify, you don't get it.

Q Well, let me try -- maybe I need to ask the question a different way.

A Okay.

Q By the time you made second mate, isn't it a fair statement that you knew how to do your job safely?

A I done it safely for 17 years and two months.

Q That's right. And in that time you had tightened a hundred rock and roll wires using cheater pipes; hadn't you?

A I said between 50 and a hundred, yes.

Q Okay. During that 17 years you have laid thousands of [210] wires and tightened the ratchets using cheater pipes; haven't you?

A I have laid a lot of wires. I don't know exactly.

Q Now, when you laid those wires, those thousands of wires that we have talked about, from time to time there would be an occasion where you would -- it would be necessary for you to tighten the ratchet using a cheater pipe toward a cargo box; isn't that right?

A Side bar ratchets.

Q Right. Every time?

A Correct, inboard.

Q All right. And if that barge is empty, then what you're tightening toward is a nine-foot drop; isn't it?

A Approximately, yes.

Q So the thousands of wires that we have talked about would include, on an almost daily basis, tightening side wires toward empty cargo boxes?

A Well, it's according to what kind of tow you have got. If you have got rake ends, the rakes are longer, you know; box ends, they are shorter. You do crank towards the cargo box, but you have a splash pan that stops your ratchet from going probably in the danger zone. I don't really know.

Q Well, let me stop you there for a minute because I must misunderstand. On the AEP-508 and the five series barges, the splash pan, as you call it, or the coaming?

[211]

A Coaming.

Q Is 17 inches high; right? A Right, I think it's 17, 18, yes. Yes, sir.

Q And we saw on the video the tape measurement that

was made; correct?

A Yes, sir.

Q And you don't dispute that measurement. I mean, that's a fair measurement?

A No, that's what I would guess it was.

Q And I guess what I am trying to find out, Mr. Perkins, is the cargo box with a 16-inch coaming, you have got to use the same care that you would use tightening that rock and roll wire toward the boat?

A Yes, sir. And I have used the same care for 17 years, which --

Q The fact of the matter is, if you're tightening one of those side wires toward the cargo box with a 16-inch coaming or less, you have got the potential, if you're not careful, that you could end up in the cargo box; correct?

A Yes. It would be worse on an empty than it would a loaded barge, but yes.

Q And if it's empty, you're talking about nine or ten feet, maybe as much as eleven or twelve feet of drop?

A Yes. Yes.

[262]

A Yes, I have.

Q Have you interviewed Wes Perkins?

A Yes.

Q Have you read Wes Perkins' deposition?

A Yes.

Q And have you reviewed the materials from which you taught school here in Cincinnati regarding deck safety?

A Yes, I have.

MR. LAWRENCE: Your Honor, I would like to submit this witness as an expert witness under Rule 702, 703.

THE COURT: Mr. Powers, any objection?

MR. POWERS: Your Honor, not at this point. Depending upon what the question is to the witness, I may.

THE COURT: Okay.

MR. POWERS: Thank you.

THE COURT: Thank you.

MR. LAWRENCE: Thank you, Your Honor.

THE COURT: Please proceed.

MR. LAWRENCE: Thank you, Your Honor.

BY MR. LAWRENCE:

Q Mr. Spiegel, are you familiar with the safety guards on tow boats on the Ohio River generally?

A Yes, I am.

MR. POWERS: Objection.

THE COURT: Well, I will permit that question, and [263] we will see where we end up.

MR. POWERS: Thank you, Your Honor.

BY MR. LAWRENCE:

Q And your answer was?

A Yes.

Q And are you familiar with guards, safety guards on tow boats of this class of boat like the C. J. Bryan, the 5,600 class?

A Yes.

MR. POWERS: Objection.

THE COURT: Basis?

MR. POWERS: Your Honor, we have an affidavit from Mr. Spiegel and a deposition, which is at least 70 pages in length, during which I asked Captain Spiegel and counsel what opinions he would be expressing at trial. And among those opinions nowhere can be found anything regarding something called a safety deck. To the contrary, what he testified to in deposition is that he has no idea whether the vessel, the C. J. Bryan, was or was not seaworthy, nor has he undertaken any investigation to determine that. Now I see that we are going down a road that was not disclosed at deposition, and I am constrained to object.

THE COURT: Mr. Lawrence?

MR. LAWRENCE: Your Honor, the deposition was open. He could have asked anything. The question was never asked [264] what could have prevented this man's fall. It's all been about rigging.

MR. POWERS: I stand by what I said, Your Honor, and I can share with you the specific cite and question. Your Honor, it's Page 53 of his deposition. I specifically asked him, repeatedly: Do you have any other opinions, do you have any opinions about the condition of the boat? And what I was told is "I don't have any opinions about the condition of the boat, I don't know what the condition of the boat was, haven't investigated, and I am not going to talk about it."

Now we hear something different.

THE COURT: Do you have the deposition,

Miss Thomas?

THE WITNESS: I don't think that's correct.

MR. LAWRENCE: Your Honor, may I be heard, or do you want me to just wait?

THE COURT: Well, I would kind of like to have the deposition in front of me when you start talking, Mr. Lawrence.

MR. LAWRENCE: May I get my copy, Your Honor?

THE COURT: You certainly may. Was it filed, Mr. Powers?

MR. POWERS: I am not sure that it was, Your Honor. I don't think it would have been. But we have a copy, or we probably have the original.

[265]

THE COURT: Okay, sorry.

MR. POWERS: I apologize.

THE CLERK: You said Page 53?

MR. POWERS: It's Page 53, Your Honor, Line 21.

THE COURT: Thank you. Okay. All right, Mr. Lawrence, what would you like to say?

MR. LAWRENCE: Your Honor, when this deposition was taken, the videotape that's been provided to the Court by the defendants was never introduced in this case, it had not been seen yet, wasn't available. Mr. Spiegel didn't get to see it. I hadn't got to see it. None of us got to see it. It was only produced August 31st, which I believe is the day before this deposition was taken.

We did not have an opportunity to see this exhibit; therefore, this -- the experts both, nor myself, had no idea what was on that tape, the videotape.

The pictures, these photographs, were presented at the deposition, laid out on the table for Mr. Spiegel, for Mr. Powers. They reviewed them, went over them together, and all of the questioning on this case was about rigging on the barges. The face wires were brought up, and that was about the size of the deposition.

THE COURT: Okay. Sustained.

MR. POWERS: Thank you, Your Honor.

[266]

BY MR. LAWRENCE:

Q Mr. Spiegel, based upon your experience on the river, do you know about stationary rigging?

A Yes, I do.

Q Do you know about stationary rigging on tow boats on the Ohio River?

A Yes.

Q And do you know about stationary rigging as it exists on barges today?

A Yes, I do.

Q And do you work with it every day?

A Every day.

Q And have you ordered it to be laid before on tow boats by your deck crew?

A When we had stationary rigging available, we tried to make use of it, if it would work.

Q Now -- and in the boats that you worked on, have you pushed empty barges, empty barges in a tow?

A Yes.

Q And are you familiar with the appropriate way or the safe way to tighten a ratchet on an empty barge faced up to a tow boat such as the C. J. Bryan?

A Absolutely.

Q Would you tell the Court, please, what the safe method is of tightening a ratchet on a face wire or rock and roll wire

...

[273]

THE WITNESS: No, I don't think he did anything wrong. He followed orders.

BY MR. LAWRENCE:

Q Sir, do you have an opinion, based upon your experience and training and the facts of this case, as to whether the fall Wes Perkins took was preventable?

A Yes, it could have been prevented. Yes, it could have been.

Q All right. Sir, in your opinion, and based upon your experience and training, is the type of rock and roll/jockey wire laid by Captain Harrington, by his direction, by Wes Perkins, a necessary piece of rigging to move 15 empty barges on the Ohio River with the current at two mile per hour and the wind at five mile per hour?

A It's not necessary.

Q Thank you, sir.

MR. LAWRENCE: Thank you, Your Honor.

THE COURT: Cross?

MR. POWERS: Thank you, Your Honor.

- - -

CROSS-EXAMINATION

BY MR. POWERS:

Q Mr. Spiegel, you talked about your experience on the river. You have also worked for Mr. Lawrence; is that correct?

[274]

A That's correct.

Q And you worked in his office as a paralegal and investigator; is that correct?

A That's correct.

Q In fact, the last time you were employed aboard a line haul vessel similar to the vessel that we are involved in here, a similar class, would have been 1979?

A Of that size?

Q Yes, sir.

A Yes.

Q Twenty years ago.

A Yes.

Q When you were decking for MG, they didn't have stationary rigging; did they?

A Yes, they did.

Q When did they get stationary rigging at MG?

A The latter part of the '70s.

Q I said when you were decking, sir.

A I decked all the time.

Q You decked as a captain?

A Yep.

Q Gets me to another question. How long were you a captain at MG Transport?

A About a year.

Q All right. You said that you had 18 years' experience as [275] a captain. You had one year of experience 20 years ago as a captain aboard a line haul vessel; correct?

A Correct.

Q You do know Captain David Hammond; don't you?

A Yes.

Q Captain Hammond is absolutely knowledgeable regarding inland river navigation, including proper methods for laying rigging and ratchets; correct?

A I would hope so.

Q Well, you told me that in deposition; didn't you?

A I am sure I did, if you say so.

Q Now, you also said, during your questioning for Mr. Lawrence, that on-the-job training, I think I heard you say, is absolutely necessary.

A Yes.

Q In other words, I heard you say that you went to a deck hand school. Deck hand schools generally, including the deck hand school where you taught, would not qualify a man to walk onto the deck of a tow and do the work of a second mate; fair?

A No. No.

Q You're agreeing with me?

A That's entry level, strictly entry level safety procedure.

Q At that point it's up to the company to provide on-the-job training so that the individual can then learn how [276]

to do the job safely; is that correct?

A Correct.

Q And that's an industrywide practice, on-the-job training?

A - Supposed to be.

Q Okay.

A Supposed to be.

Q You have no reason to disagree with me if I suggest to you that Mr. Perkins was provided with on-the-job training which would be at least up to the level of industry practices; do you?

A No reason to. I shouldn't think so.

Q Now, you laid rock and roll wires when you were working at MG Transport; correct?

A I have never heard of a rock and roll wire until I came up on the Ohio River.

Q Yeah, I remember that from your deposition. You called them a roll wire?

A That's the only way they were called on the Mississippi.

Q All right. You would agree with me that whether rock

and roll wires are used or not used, based upon weather conditions, geographic location or whatever the situation may be, is a matter best left to the discretion of the captain or the pilot?

A Yes. Matter of preference.

Q All right. And you would also agree with me, would you [277] not, Mr. Spiegel, that particularly a second mate, a man of 17 years' experience, if that man comes across a ratchet or a wire, and he considers there te be some danger to himself, that's something he ought to bring up to the pilot house or the captain; is that a fair statement?

A I will go along with that.

Q All right. A second mate is responsible for making sure that the tow is wired up correctly on his watch; fair statement?

A Fair statement. Shares part of the responsibility with his captain.

Q All right. Captain tells him he wants a rock and roll wire laid, it's up to the mate to lay it the way the captain wants it, and to do it safely?

A Correct.

Q Now, if a mate comes across a wire, or a second mate, and he decides that he wishes -- not comfortable with it and wishes to tighten it another direction, what are his options?

A Well, you don't have many options. You either use what's -- what the company has left for you, or you get a portable rigging off the boat.

Q All right. Do you know where AEP keeps their portable ratchets?

A Probably on the second deck. I am not sure.

Q If I told you that they kept them hanging on the tow [278] knee, how far would that be from where Mr. Perkins fell?

MR. LAWRENCE: Objection, Your Honor, not a fact, not in evidence.

THE COURT: Overruled.

THE WITNESS: It would be pretty close to where he fell.

BY MR. POWERS:

Q Now, I think you told me during your deposition that even a stationary ratchet can be tightened the other direction. Tell us how that works.

A It depends on what type of system you're using. You can -- I don't know if the Court is familiar with a stationary rigging, but this -- the kind of rigging that you're talking about, I don't know that you could turn it around. But rigging that's shackled into a D ring, you can take your ratchet and -- and stand it up and move it to the other side of the D ring so

it tightens the other way.

Q Some stationary rigging works that way, and you haven't investigated whether AEP's does or not; is that fair?

A Well, since our deposition I have.

Q Since your deposition?

A Yes.

Q Let's talk about cheater pipes for a second.

A Okay.

Q You would agree with me, would you not, that the use of [279] cheater pipes in the inland river industry is commonplace and an industry standard?

A Yes.

Q During your class you taught students how to use cheater pipes?

A Yes.

Q And putting together a tow without the use of a cheater pipe, in your opinion, is unacceptable?

A For the most part, yes.

Q Now, you testified that the rock and roll wire presented, I think you said, an unacceptable danger or safety

hazard. Correct me if I am mischaracterizing what you said. Why is that; because you're tightening toward the boat?

A Well, this situation you are, yes.

Q All right. Let me ask you, if the ratchet were turned around, as could have been done in this case, and assuming that the coaming is 16 to 17 inches high, now you're tightening toward what?

A Tightening towards the hopper of the barge.

Q Right. What's the drop-off there?

A About nine feet.

Q Now, you would agree with me, would you not, that any job out on the tow of a river vessel can be done safely if appropriate care is taken?

[280]

A Appropriate care and the proper equipment.

Q Okay.

A Supervision.

Q Tightening toward the boat, in this case, with a man of Wes Perkins' experience, could have been done safely if Perkins had taken adequate care?

A I believe he took all the care necessary.

Q That's not my question. Tightening toward the boat in this case could have been done safely by Mr. Perkins if he had used adequate care; isn't that true?

A He used adequate care.

MR. POWERS: Could the clerk provide Mr. Spiegel with his deposition, please.

THE CLERK: What page?

MR. POWERS: 46.

BY MR. POWERS:

Q On Page 45, sir, I asked you: Would you agree with me that if a ratchet is laid with a tightening outboard and a cheater pipe is used, that job can be done safely if appropriate care is taken?

A Just a minute, please, you said 46. Now you're back on 45. Where are we?

Q I am sorry, Page 45, Line 16.

A Line 16, okay, thank you. Okay.

Q Just tell me when you're ready.

[281]

A I am ready.

Q And you said, in response, any job can be done safely if appropriate care is taken. There is always a risk of accident.

A Yes, that's correct.

Q And then I asked you, at the bottom of that page, and in fact, even if you're tightening the ratchet outboard, using the cheater pipe, that also -- that also can be done safely if appropriate care is taken under the circumstances. Your answer: Can be done safely, but it's a direct violation of the company safety policy. Do you see that?

A Yes.

Q Would you agree with me, Mr. Spiegel, that that job, tightening the ratchet toward the boat, can be done safely if adequate care is taken?

A It can be.

Q Thank you.

Now, Mr. Perkins also has an obligation toward the safety of this operation; doesn't he?

A Yes.

Q His obligation is to use his training and his experience, as well as his common sense, to perform the work safely; fair?

A That's fair.

Q Any person with ten years' experience as a deck hand, and [282] seven years' experience as a second mate, has sufficient experience, does he not, to have learned how to safely lay and tighten a ratchet?

A That's correct.

Q Mr. Perkins, if I understand your testimony on your qualifications, had about 14 years more experience on the deck than you have had.

A My deck experience is ongoing, so I wouldn't say that is correct.

Q All right. Let me try it this way: How much experience did you have working as a deck hand on line haul vessels?

A Well, I worked line haul vessels for eight, nine years, something like that.

Q All right. So he has got twice as much experience as you on line haul vessels?

A You know, if you want to narrow it down to that, that's fine. But I also worked line haul vessels in the harbor, and there is very little I don't know about decking.

Q Now, common sense would tell any deck hand of any experience that he shouldn't straddle a ratchet when he is tightening the wire with a cheater pipe; fair statement?

A Yeah, but you know what, I haven't figured that one

out yet. I don't know how fair that is.

Q Can I just back up for a second?

A Yeah, go ahead.

[283]

Q Because I didn't hear your answer. Are you agreeing with me, common sense would tell him not to do that?

A The safety rule says that.

Q Well, let's look at your deposition.

A Okay.

Q Page 27. I am looking at Line 14, if you can read with me: What did you tell your students about straddling the ratchet?

Answer: It's against the safety rules.

Question: Why is it against the safety rules?

Answer –

A What page are you on, Mr. Powers?

Q I am sorry. I apologize. It's been a long day. Page 26. I am really sorry.

A Okay.

Q Page 26, Line 14. Very sorry. And please just tell me when you're ready.

A I am ready.

Q What did you tell your students about straddling the ratchet?

Answer: It's against the safety rules.

Question: Why is it against the safety rules?

Answer: Well, it's common sense. If something comes loose, something breaks, you never want to be straddling a rope, straddling a wire, et cetera. [284] But the point is, you agree with me that for a man of eight years' experience, which you have, you characterize it as common sense not to straddle a ratchet. Isn't that right?

A That's common sense. Any position you're in on either side of the ratchet, you stand in danger of hurting -- getting injured.

Q Absolutely right. And when you're out on the tow and you're tightening inboard, by your definition, and we will get to that in a minute, when you're tightening a ratchet inboard, you have the same danger, don't you? You have the danger, if you're not cautious and careful, of a dog slipping and you being propelled into a cargo box with a nine-foot drop?

A Never heard of anybody going in a cargo box, I am sorry.

Q Never?

A Never. You do have a coaming there.

Q Now, I think you would also agree with me that common sense would tell you, and also would tell a deck hand of Mr. Perkins' experience, a second mate, to look at the gear and dog before using the ratchet, particularly if you're tightening toward the boat on a short deck?

A Yes.

Q Common sense would tell him that; right?

A Right.

Q The reason you want to look at the gear and the dog is to [285] see if there is any coal in it, to see if it's worn, to see if the dog is rounded off, those kinds of things?

A Yes.

Q Now, let me ask you, in your experience, whether you have ever seen coal cause a dog to slip.

A I don't know -- generally what causes a dog to slip is it's worn out.

Q Okay. You also want to make sure there is no coal in it so that doesn't create a problem?

A Well, usually if it's buried in coal it's going to create a problem.

Q If there is ice in it, that can create a problem?

A Absolutely.

Q Okay. Now, if Mr. Perkins, I think we have covered this, but you agree with me that if Mr. Perkins wanted to tighten the other direction, toward the cargo box, there wasn't any -there certainly wasn't any company rule at AEP, policy, or standing order that you're aware of that would have prevented that?

A All right, well, the practice, I don't know what you're asking, I mean, is that a "yes" or "no" answer?

Q Sure. I think it is. If you don't understand it, tell me. I will rephrase it.

A Rephrase it then, please.

Q All right. I can break it down. At AEP, are you aware [286] of any company policy, safety rule, or standing order that prevented this man, Mr. Perkins, from taking a portable ratchet out onto that barge and tightening it the other direction?

A From what I have read, it's not AEP's practice to take portable rigging off the boat, although it should have been.

Q And what specifically have you read that tells you that, sir?

A From Mr. Perkins.

Q Mr. Perkins? Mr. Perkins'deposition?

A I don't know, his deposition or just notes, but –

Q Mr. Perkins has notes?

A He said it wasn't his practice to take rigging off the boat, they want you to use what's available on the deck.

Q It wasn't Mr. Perkins' practice, that's what you're telling the Court?

A No, Captain Harrington.

Q You did read Mr. Perkins' deposition?

A Yes.

Q Do you recall reading that Mr. Perkins didn't ask Captain Harrington about putting a portable ratchet out? You recall that; don't you?

A Yes.

Q Thank you. Your Honor, if I can have a moment?

[287]

THE COURT: Certainly.

(A discussion was held off the record.)

MR. POWERS: No further questions, Your Honor. Thank you.

THE COURT: Redirect?

MR. LAWRENCE: Couple more, Your Honor.

- - -

REDIRECT EXAMINATION

BY MR. LAWRENCE:

Q Mr. Spiegel, you have been asked about the tightening of a ratchet back in towards the boat off an empty, on cross-examination; you remember that question?

A Yes, sir.

Q And you were asked can it be done safely?

A Yes, sir.

Q And I believe your answer was, yes, it can be done safely?

A Yes, sir.

Q Under the circumstances that existed December 28th, 1997, could it be done safely, sir, in your opinion?

MR. POWERS: Your Honor, I am sorry, but

I couldn't hear that. I don't know if there is -- I don't mean to have you repeat it, but I just didn't hear the question.

THE COURT: Can you read it back?

MR. LAWRENCE: I can restate, Your Honor.

...

[296]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[September 22, 1999]
No. CIVIL 1-98-64

JAMES W. PERKINS,
PLAINTIFF,

v.

AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., ET AL.,
DEFENDANTS.

Trial to the Bench
for the Southern District of Ohio at Cincinnati,
Sandra S. Beckwith, District Judge

VOLUME III COMPUTERIZED TRANSCRIPT
Beverly W. Dillman,
Federal Court Reporter

APPEARANCES:

MEREDITH LYNN LAWRENCE, ATTORNEY AT LAW JAMES BURDETTE HELMER, JR., ATTORNEY AT LAW

ON BEHALF OF THE PLAINTIFF.

TODD MATTHEW POWERS, ATTORNEY AT LAW

ON BEHALF OF THE DEFENDANTS.

...

[381]

same set of circumstances here.

What I attempted to show here is that many, many times tow boats handle mixed tows. They don't always have just empties, they don't always have just loads; they will have some loaded barges and some empty barges. So it's a common occurrence to have to put empties and loads together. And at times, you -- you -- because of the wiring, the configuration, the timberheads, there is variables as to how you may have to do it. But there are occasions, routine occasions whereby the deck hand must wire this empty barge up to this load. We had a photograph a while ago that actually demonstrated this better than this -- than this video is going to, I think, but these are loaded barges down here, we can see the ladder, and here we have our deck hand, and the concept here was to demonstrate that there is a hazard, a risk of hazard to a deck hand, to Mr. Perkins, when he tightens, and when he encounters this in his 17 years on a boat.

Q Let's stop that, Paul.

A Okay.

Q You were just talking about the hazard that the deck hand might encounter. I want to ask you if the video shows that exact hazard. Back it up, if you would, Paul. Okay, back a little further. Right there.

A I am not sure that I understand the question.

[382]

Q Does this video show the dog slipping?

A Oh, I am sorry, this does, this particular one does indeed show the dog slipping. And I am sorry, I was thinking it was the next one. And I definitely need to -- I want to show that. If we watch close, that dog is going -- there, that dog slipped.

Can we replay that, please? My apologies for this. And we will watch him close, we don't really see the dog slip, but we see his body move because that dog slipped.

Q Now, we are saying "slipped," that" means it came out of the gear?

A It came out of the gear. And we see him slip. That, incidentally, was just -- it just happened. It happens.

Q That was not staged?

A No, it was not.

Okay, and he has completed that operation. This next and final demonstration will be the same thing, the empty barge, the loaded barge, and we simply will demonstrate the improper way. Again we see -- I tried to maintain consistency as much as I could. We see the deck hand straddling the ratchet. He will go beyond the caution area into the red area.

Q Show us at one point he starts pushing the ratchet?

A My opinion, he starts pushing the ratchet when he gets somewhere a little past vertical is when he starts pushing the [383] ratchet. I mean, you're pulling, and then you're pushing, like when you get somewhere a little past vertical, the deck hand starts to push the cheater bar.

Q Is that pushing?

A Yes. That's the end of the videotape.

Q Thank you.

Captain Hammond, based upon your experience and your training, what is the industry practice with respect to the use of rock and roll wires or jockey wires, such as Mr. Perkins was tightening on the night of his injury?

A The industry practice, I am not sure I understand the question. They are commonly used.

Q That's what I want to know.

A They are used -- it depends on the trade. It depends on where the vessel is operating. It depends on the vessel. They are very common -- very commonly used wire.

Q Have you used them?

A Yes, I have.

Q And are they commonly used or uncommonly used on the lower Ohio River?

A They are commonly used and almost always used on the lower Ohio River.

Q Are they wires that are only necessary to compensate for some architecture or engineering deficit of the boat?

...

[391]

Perkins' duties were, had he felt that he was placed in a position which jeopardized his safety.

A His duties were to correct the situation. He had several options available to him to do that.

Q What would those have been, please?

A Well, first and foremost, if Mr. Perkins was unsatisfied or unhappy or felt any concern whatsoever about that particular wire or ratchet, its configuration, its purpose or anything related to it, he could simply have said to the captain "I am not happy with this."

Q Would you look at Exhibit M, I think we will get this right this time, just the second page in. And I want to call your attention –

A Page 2?

Q Yes, the second page in, but it's numbered Page 5. Wait, I am sorry, it's -- actually, on your copy, it will be the fourth page in, numbered Page 5, Paragraph 1.04.

A I have that Paragraph 1.04.

Q Will you read that to the Court, please.

A Before attempting any work under conditions which you believe are unsafe, you should call these conditions to the attention of the person in charge and ask his advice.

Q Is that the rule to which you just referred?

A That rule is applicable to what I just referred to, yes.

Q Captain Hammond, had Mr. Perkins followed the procedure [392] shown in the videotape, and had he tightened the ratchet that he was tightening at the time of his injury, only within what you have described to the Court as the safety zone, would the dog slipping, in your experience, have caused him to fall from the edge of that barge to the deck of the boat?

A No, it would not.

Q Captain, can you tell us, please, what typically causes a ratchet to slip.

A There are several things -- you're talking about the dog slipping in the ratchet?

Q Yes, sir.

A There are several things that can cause it. Wear and tear, of course, can cause the dog to slip, whereby as it wears over age, it gets rounded off.

Q Did Mr. Perkins, as second mate, have an obligation to determine the condition of the gear and the dog in terms of its wear and tear before using it?

A He had an obligation to do that, yes.

Q Do you know one way or the other, Captain Hammond, whether the ratchet that Mr. Perkins was using at the time of his injury was in any way defective or had a worn gear or dog?

A I have no way of knowing that.

Q Are you familiar with the maintenance and replacement procedures for ratchets on AEP barges in place at the time Mr. Perkins injured himself?

[393]

A By that do you mean written procedures that were in place or the general practice?

Q Any procedure, written or oral, the procedure they followed to maintain and replace ratchets.

A Well, they carried spare parts on board the vessel, they had a clear mandate, the second mate and mate, that they are to replace any defective ratchets or defective rigging with new. And they carried spare ratchets and spare parts and tools available to accomplish that task.

Q Is that an adequate policy, in your opinion?

A Yes, it is.

Q How does that policy compare with other companies within the industry?

A It's nearly identical.

Q Do you have any criticism of relying on mates and second mates to determine the condition of the ratchet and decide themselves whether it needs to be replaced or repaired?

A They are the ones that are most trained, and they are there every day, so I have no criticism. It's the natural choice.

Q Are you aware, Captain Hammond, of any condition aboard AEP-508, the barge upon which the plaintiff was working at the time of his injury, which made it unfit for service or unseaworthy?

A At the time he was working I am not aware of any [394] condition that made that barge unseaworthy or unfit for its intended purpose.

Q Are you aware of any condition aboard the MV C. J. Bryan, or the lack of any equipment aboard that vessel, which, at the time of plaintiff's injury, rendered that vessel unfit for its service or unseaworthy?

A No, no. It was a seaworthy vessel in every respect.

Q There has been testimony, Captain Hammond, of the possibility of a chain rail. And do you understand what that testimony has been?

A I believe I do.

Q First of all, let me ask you to explain to the Court your understanding of where it has been suggested a chain rail might be placed on the C. J. Bryan in connection with this case.

A My understanding is that, based on what I heard in the courtroom, is that a chain rail or some type of chain or rope should be placed between the tow knees at the top of the tow knees. I am not sure that it was anything more specific than that. I believe they were probably talking about something from the handrailing, top of the handrailing, from one handrail to the other handrail, across the front of the boat from tow knee to tow knee.

Q Are these the handrails?

A Yes.

[395]

Q Hard to see, but they are on the inside of the tow knees?

A That's correct.

Q All right. First of all, how many tow boats would you say, line haul tow boats, have you been aboard in your

career?

A Oh, I couldn't begin to tell you. I have been aboard, in some official capacity, I have probably been aboard, conservatively, I have been aboard 60 to a hundred. I wish I could narrow it down, but I couldn't.

Q All manufacturers, all boat builders?

A All manufacturers.

Q Have you also visited aboard boats that you weren't working on?

A Well, in some official capacity. By that I don't mean I was the pilot or the captain, I might have been on for a survey reason or on to purchase the vessel.

Q Are you aware, in your career on the river, of any case in which the railing, or the chain rail that's been described, you have seen that type of chain rail placed on a tow boat of this class?

A No, I have not.

Q Have you ever seen such a chain rail on a tow boat of any class?

A I have seen small harbor tugs with a rigging deck.

Q I am not asking you about rigging decks, I am asking you about chain rails for a moment, and then we will go to --

[396]

A Well, where there is a rigging deck, there is a chain rail, because you have a deck up there that employees are exposed to fall overboard. So I have seen small harbor tugs with a chain rail between the tow knee, to answer your question, but it's always in conjunction with a rigging deck.

Q All right. The boats that you have seen, the rigging deck, which we will get to in a moment, and the chain rail, would they be boats which would be appropriate for use on the lower Ohio River in the trade to which the C. J. Bryan was dedicated at the time of plaintiff's injury?

A No, they would not.

Q Why not?

A They are not designed, nor are they suited for that trade. Once again, as I said earlier, that trade requires certain specific characteristics on the vessel. Harbor boats are -- smaller tugs or vessels that I have seen with that particular chain rail or rigging deck are not suitable for several -- numerous reasons.

Q How would one put a chain rail across here that would -that would be effective in preventing someone from falling off of a barge?

A In my opinion you could not.

Q Why not?

A There are several -- again, several reasons why you wouldn't and couldn't. You couldn't because -- you could, you

...

[402]

Q Yes, sir.

A Would the vessel be appropriate to be used in this trade?

Q You just testified that if you put the deck on the plaintiffs have talked about, the capstan line can't be used with empty barges. My question is, assuming that that is the situation, and the capstan line can't be used, can the tow boat be used to transport these barges on the Ohio River, on the lower Ohio River in the trade that the C. J. Bryan was involved in at the time of Mr. Perkins' injury?

A It cannot safely be used in that trade under them circumstances.

Q Captain Hammond, do you have an opinion, based upon your experience and training, as to whether the lack of a chain rail, as was described during plaintiff's case, between these tow knees on the C. J. Bryan, rendered the vessel unfit for its service, or unseaworthy?

A The lack of a chain rail, as was described between the tow knees, does not in any way render this vessel unfit or unseaworthy.

Q Does the lack of the chain rail cause this vessel to vary in any way from industry standards in terms of the equipment aboard towing vessels of this class in this trade?

A No, sir.

Q Captain Hammond, do you have an opinion as to whether the [403] lack of a rigging decking, or a safety deck, as described during plaintiff's case, rendered the MV C. J. Bryan unfit for its service or unseaworthy at the time of plaintiff's injury?

A The vessel was -- the lack of a rigging deck and/or, as it was called in the case, a safety deck, would not render this vessel unseaworthy.

Q Are you aware of AEP vessels which have rigging decks?

A There are some that they work up on the Kanawha River, you know, I don't know their names, they have got some small ones that do that. They work the Kanawha River, at times they come out and work the Ohio River, smaller, smaller class vessels.

Q Would those vessels be appropriate vessels for use in the trade that the C. J. Bryan was involved in at the time of Mr. Perkins' injury?

A They would not be appropriate to that trade.

Q Why not?

A They are not the same class, they are not the same size vessel. They are different -- they are a different vessel.

Q Captain Hammond, did American Electric Power River Division provide Mr. Perkins with appropriate training and equipment necessary to allow him to perform the duty of tightening the rock and roll wire that night safely?

A Could you repeat that question, please?

Q I hope so. Did American Electric Power River Division [4O4] provide Mr. Perkins with appropriate training and equipment necessary, which would allow him to safely tighten the rock and roll wire which he was tightening at the time of his injury?

A Yes, they did.

Q Did American Electric Power River Division, on the night of Mr. Perkins' injury, provide him with a safe place to work?

A Yes, they did.

Q Did American Electric Power, on the night of Mr. Perkins' injury, provide him with all of the equipment necessary to perform his job safely?

A Yes, they did.

Q Was the barge AEP-508, and the towing vessel C. J. Bryan, upon which Mr. Perkins was working at the time of his injury, were those vessels seaworthy; that is, fit for duty

for this work at the time of his injury?

A Yes, they were.

MR. POWERS: If I can have a moment, Your Honor?

THE COURT: Yes, certainly.

THE WITNESS: May I step down, Your Honor, and get a glass of water?

THE COURT: You may. Miss Thomas will provide you with one.

MR. POWERS: I don't have any further questions of Captain Hammond. Thank you, Your Honor.

[405]

THE COURT: Okay. Mr. Lawrence, it's five minutes of 5:00. I think what I need to do is -- I need to give you an opportunity to decide whether you want to cross right this afternoon first, and I need to know if my staff is available to stay later tonight in the event that you want to go late.

MR. LAWRENCE: Your Honor, I have a lot of work to do with this witness, and it will be a while to finish tonight.

THE COURT: So do I gather then you would just as soon cross tomorrow morning?

MR. LAWRENCE: Yes, ma'am, I would be happy to go to 5:00, if the Court wishes, or whatever the Court decides.

THE COURT: Well, I don't want to interrupt your cross, give you five minutes and then interrupt you.

MR. LAWRENCE: Thank you, Your Honor.

THE COURT: Mr. Powers?

MR. POWERS: I don't have any problem with him taking it up tomorrow. And if the Court wishes to go later, I am available to do that, so --

THE COURT: Well, I don't want you to feel rushed. Mr. Lawrence --

MR. LAWRENCE: I may have quite a bit to do with this witness, Your Honor.

THE COURT: All right. Well, why don't we just recess for the day then, and, Captain, we will see you at 9:00

...

[408]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[September 23, 1999]
No. CIVIL 1-98-64

JAMES W. PERKINS,
PLAINTIFF,

v.

AMERICAN ELECTRIC POWER FUEL SUPPLY, INC., ET AL.,
DEFENDANTS.

Trial to the Bench
for the Southern District of Ohio at Cincinnati,
Sandra S. Beckwith, District Judge

VOLUME IV COMPUTERIZED TRANSCRIPT

Beverly W. Dillman,
Federal Court Reporter

APPEARANCES:

MEREDITH LYNN LAWRENCE, ATTORNEY AT LAW JAMES BURDETTE HELMER, JR., ATTORNEY AT LAW

ON BEHALF OF THE PLAINTIFF.

TODD MATTHEW POWERS, ATTORNEY AT LAW

ON BEHALF OF THE DEFENDANTS.

...

[499]

determine the likelihood of the dog, or the -- the dog slipping, the dog kicking out?

A Well, there are degrees of serviceability, as I said before, so it would indicate to him, within a certain parameter, that the -- the -- how should I word this -- the chance of the dog slipping out. It wouldn't, with certainty, tell him that the dog will or will not slip, but it would indicate to him a degree of forewarning, if you will.

Q As I understand it, it's your testimony that if you were on that barge 508 the night of Mr. Perkins' injury, and you came across the ratchet marked Exhibit 3, you would have repaired or replaced that ratchet; is that fair?

A That's fair. That's what I would have done.

Q What about the other ratchet?

A I would have used the other ratchet.

Q And I think that's been marked Exhibit 2.

MR. POWERS: And, Larry, am I correct that both of them are Plaintiff's Exhibit 15?

MR. LAWRENCE: That is correct.

MR. POWERS: Thank you.

BY MR. POWERS:

Q How long have you been on the river working?

A Oh, working, I started work in 1967. Nearly 33 years.

Q Since 1967, other than Mr. Perkins, are you aware of any other deck hand, second mate, anyone, falling from an empty [500] barge to the deck of a boat, tightening a rock and roll wire such as he was tightening at the time of his injury?

A No. No.

Q Can you tell us, please, what the responsible carrier program is.

A The responsible carrier program is an initiative by an industry organization called the American Waterways Operators. It's designed to create a heightened safety and operating awareness within the inland towing industry in the United States. It's a policy whereby the members of the American Waterways Operators have agreed to -- to operate under certain standards and policies and procedures that -that are the best available to share information and to incorporate them across the board so that the operating environment is as safe as can be.

Q Does American Electric Power River Division participate in the responsible carrier program?

A Yes, they do.

Q Have they been subject to audits, which include inspection of their vessels?

A Yes, they have.

Q Have those inspections and audits resulted in any recommendation of either of the devices that Mr. Lawrence has talked about on cross-examination, that being the rigging deck or the safety chain?

[501]

A Your question is have those audits suggested that those items be installed, is that –

Q Yes, sir, that's my question.

A The answer is no.

Q Are you aware one way or the other as to whether AEP permits the Coast Guard to board its vessels, inspect them, and provide suggestions?

A Yes, they permit the Coast Guard to do that.

Q And are you aware one way or the other as to whether the Coast Guard has ever made a recommendation that the safety appliances that Mr. Lawrence has suggested on cross-examination be installed on this or any other vessel operated by AEP?

A The Coast Guard has made no recommendation to that effect.

Q Are there other situations, other than tightening a rock and roll wire, where a deck hand is faced with the same or similar safety hazards?

A Yes, we have demonstrated that.

Q And if you would just list those quickly, please.

A They are demonstrated in the video, an empty to a loaded barge creates somewhat of the same hazard. The operation on an empty barge, where -- through a double wire situation, the deck hand is required to operate the ratchet outboard over the river, creates a situation whereby he could fall in the river...